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No. 83-.....

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

MITSUI & CO., LTD., AND
MITSUI & CO. (U.S.A.), INC.,

*Petitioners,*

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION,
INDONESIA INDUSTRIAL INVESTMENT CORPORATION, LTD.,
AND FOREST PRODUCTS CORPORATION, LTD.,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether a plaintiff that alleges only injury to itself from increased competition, and does not allege *anticompetitive* injury, *i.e.*, injury of a kind that the antitrust laws were intended to prevent, has standing to sue for treble damages under the Clayton Act.

2. Whether a foreign commercial dispute that has no *anticompetitive* effect upon United States commerce is within the jurisdictional scope of the Sherman Act.

3. Whether the Act of State Doctrine permits a court of the United States to inquire into conduct of the Government of Indonesia to determine its motives for official acts that precluded respondents, as a matter of Indonesian law, from entering into a logging business on Indonesian state-owned forests.

4. Whether the doctrine of common-law *forum non conveniens* can be applied in an antitrust case involving a relocation to a foreign forum.

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*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners Mitsui & Co., Ltd., and Mitsui & Co. (U.S.A.), Inc., hereby petition for a writ of certiorari to review the judgment of the court of appeals in this case.

## OPINIONS BELOW

The first opinion of the district court (App. A, *infra*) is unofficially reported at 1978-1 Trade Cas. (CCH) ¶ 62,130 (S.D. Tex. 1978). The first opinion of the court of appeals (App. B, *infra*) is reported at 594 F.2d 48. The second opinion of the district court (App. E, *infra*) is not reported. The second opinion of the court of appeals (App. F, *infra*) is reported at 671 F.2d 876. The third opinion of the court of appeals (App. I, *infra*) is reported at 704 F.2d 785.

## JURISDICTION

The most recent opinion of the court below (App. I, *infra*) was rendered May 9, 1983. The court's order denying rehearing

(App. J, *infra*) was entered June 13, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, as amended, 15 U.S.C. §§ 1, 2, in pertinent part provide:

> § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .
>
> § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

Section 4 of the Clayton Act, as amended, 15 U.S.C. § 15, in pertinent part provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee . . . .

## STATEMENT OF THE CASE

This case arises out of competition between petitioner Mitsui & Co., Ltd. ("Mitsui"), and Forest Products Corporation ("Forest Products"), the predecessor in interest to respondent Industrial Investment Development Corporation ("Industrial Investment"), for the right to purchase the logs harvested by an Indonesian corporation, P. T. Telaga Mas Kalimantan Co. ("Telaga Mas"), from a particular tract of forest in Indonesia under a concession granted to it by the Indonesian Government. Forest Products attempted to form a joint venture with Telaga

Mas to exploit the concession. After considerable internal debate and prolonged legal skirmishing in Indonesian courts between rival groups of its shareholders, Telaga Mas determined not to proceed with the joint venture. The Indonesian Government, in its sovereign capacity, then withdrew its approval of the joint venture. Instead, Telaga Mas obtained financing from Mitsui to develop the concession by contracting to sell its log production exclusively to Mitsui's American subsidiary, Mitsui & Co. (U.S.A.), Inc. The logs so obtained never entered American commerce but were imported only into Japan by the Japanese parent, Mitsui & Co., Ltd.

Disappointed with the result of its efforts in Indonesia, Industrial Investment and two other related corporations brought this action in the United States District Court for the Southern District of Texas, asking for treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, on the ground that, by allegedly inducing Telaga Mas to deal with it rather than with Forest Products, Mitsui somehow had violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.[1] Mitsui moved to dismiss the action on four separate grounds: that adjudication was barred by the Act of State Doctrine; that the dispute between the parties was beyond the reach of American antitrust laws; that Industrial Investment lacked standing to sue for treble damages under the Clayton Act because the injury it had alleged was not of the kind that the antitrust laws were intended to prevent; and that under the doctrine of *forum non conveniens* the case should not be tried in the courts of the United States. Thus, the essence of Mitsui's motion was that an essentially local Indonesian dispute, involving competition between potential buyers from a single logging concession in that country, did not

[1] To support its claim under the Sherman Act, Industrial Investment alleged a conspiracy between Mitsui, its American subsidiary, and Telaga Mas. In the alternative, Industrial Investment alleged conversion and tortious interference with Forest Products' contractual rights, including violations of Indonesian law.

present an issue appropriately justiciable under American antitrust laws or in an American court.

The district court initially dismissed the action on the ground that adjudication of the dispute was barred by the Act of State Doctrine. App. A, *infra*. The court of appeals, in a split decision, reversed, holding that the Act of State Doctrine does not bar inquiries into the motivation, as distinguished from the validity, of the acts of a foreign government. App. B, *infra* p. 22a. Despite the recommendation of the United States, as *amicus curiae*, that certiorari be granted to resolve an inter-circuit conflict, this Court denied certiorari, 445 U.S. 903 (1980). On remand, the district court entered a second order of dismissal, on the grounds of extraterritoriality, lack of standing, and *forum non conveniens*. App. E, *infra*.[2] Once again, the court of appeals reversed. App. F, *infra*.

In considering the issue of extraterritoriality, the court of appeals began with the premise that any alleged restraint of trade, anywhere in the world, that "affects the flow of commerce into or out of the United States is within the scope of the Sherman Act." App. F, *infra* p. 36a. Merely on the basis of its assumption that Industrial Investment's inability to purchase logs from Telaga Mas could have affected the total quantity of lumber imported into the United States, without considering whether such an effect upon United States commerce was either

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[2] The district court in its discretion declined to exercise pendent jurisdiction over the non-federal claims and held that diversity of citizenship was lacking. App. E, *infra* p. 29a. The court also held that dismissal was appropriate under the "*Noerr-Pennington*" doctrine. *Id.* Petitioners did not brief this issue on appeal because of the then lack of case authority for applying that doctrine in a foreign context. However, shortly before remand the Fifth Circuit held that the doctrine does apply to the petitioning of a foreign government. *Coastal States Marketing, Inc.* v. *Hunt*, 694 F.2d 1358, 1365 (5th Cir. 1983). Following remand, petitioners requested permission to brief the *Noerr-Pennington* question fully for the first time, in light of *Coastal*, but the panel below refused any briefing on that question.

significant or anti-competitive, the court held that the dispute between Industrial Investment and Mitsui was within the reach of American antitrust laws.

With respect to the question of standing, Mitsui had argued that under this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), a plaintiff, in order to be permitted to go to trial, must allege injury of a kind that the antitrust laws were intended to prevent. The court of appeals rejected this reading of *Brunswick*. The court stated that "*Brunswick* is not a standing case," App. F, *infra* p. 47a, and expressed the view that "[i]t is analytically unsound . . . to consider the requirement of antitrust injury an additional component of the standing inquiry." *Id.* at 48a. The court acknowledged that, following *Brunswick*, "two other circuits have held that antitrust injury is a component of standing. *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229, 1234 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981); *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495, 498-500 (9th Cir. 1977)." App. D, *infra* p. 49a n. 15. But the court explicitly "disagree[d] with their analysis," *id.*, and held that Industrial Investment, in order to proceed to trial, need not allege an injury of the type that the antitrust laws are intended to prevent.

The court of appeals further rejected petitioner's *forum non conveniens* defense. It held that this Court's decision in *United States* v. *National City Lines, Inc.*, 334 U.S. 573 (1948), foreclosed recourse to the doctrine of *forum non conveniens* in every antitrust case and was not limited to cases in which the alternative venue lies in a court of the United States. App. F, *infra* pp. 51a-52a.[3]

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[3] Since the remand from the Fifth Circuit, extensive discovery (including numerous depositions in Japan of petitioners' personnel) has taken place and, since stays have been denied, that discovery is proceeding apace.

This Court granted petitioners' petition for writ of certiorari (No. 82-178) and summarily vacated the judgment of the court of appeals and remanded for further consideration in light of *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters* (hereinafter sometimes "*A.G.C.*"), 103 S.Ct. 897 (1983). *See* 103 S.Ct. 1244 (1983).[4] The court of appeals denied petitioners' request for full briefing and oral argument but permitted the filing of short supplemental statements.

In a two-page *per curiam* opinion (App. I, *infra*), the Fifth Circuit panel admitted that its "discussion of standing at 671 F.2d 885-890 was faulty" in light of *Associated General Contractors* App. I, *infra* p. 60a. Once again, however, it reversed and remanded the judgment of the district court. *Id.* at 61a. The court still refused to delineate "the necessary causal connection between violation and injury" as a question of "antitrust standing." *Id.* at 60a. The Court analyzed the issue as one of directness of injury but did not address the question of whether the alleged injury is of the type which American antitrust laws are intended to prevent.

## REASONS FOR ALLOWING THE WRIT

This case presents the Court with an opportunity to clarify antitrust standing and jurisdiction in terms of Congress's intention to prohibit only *anticompetitive* acts and to explain more fully under what circumstances controversies that are essentially foreign nevertheless belong in American courts. On the question of antitrust standing, the court of appeals has failed properly to

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[4] On the same day, the Court acted in two other antitrust standing cases which apparently it had held pending its decision in *Associated General Contractors*. The cases raised an identical issue. In *Bichan* v. *Chemetron Corp.*, 681 F.2d 514 (7th Cir. 1982), decided favorably to defendants, it denied certiorari. 103 S.Ct. 1261 (1983). *Ostrofe* v. *H. S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982), decided for plaintiff, it vacated and remanded in light of *Associated General Contractors*. 103 S.Ct. 1244 (1983).

reconsider its second opinion in accordance with this Court's instructions to it and in light of *A.G.C.* The opinion thus is in conflict with this Court's decisions in *A.G.C.* and in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982), and with the opinion of the Sixth Circuit in *Southaven Land Co.* v. *Malone & Hyde, Inc.*, 1983-2 Trade Cas. (CCH) ¶65,564 (6th Cir. Aug. 23, 1983). The court of appeals' holding on the issue of extraterritoriality – that an alleged *foreign* restraint of trade may be within the reach of the Sherman Act even where its effect upon United States commerce is neither significant nor anticompetitive — conflicts with *National Bank of Canada* v. *Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981), and *Bunker Ramo Corp.* v. *United Business Forms, Inc.*, 1983-2 Trade Cas. ¶65,515 (7th Cir. July 26, 1983). The court of appeals' holding on the Act of State Doctrine — that the Doctrine permits American inquiries into the motivation (as distinguished from the validity) of the acts of a foreign government — conflicts with *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *Occidental Petroleum Corp.* v. *Buttes Oil & Gas Co.*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); and *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 1983-2 Trade Cas. (CCH) ¶65,523 (9th Cir. Aug. 2, 1983). The court of appeals' holding regarding *forum non conveniens* — that that principle does not apply to a transfer of an antitrust case to a foreign forum — is an important issue that has never been, but should be, decided by this Court, and that holding contravenes the reasoning of *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981).

1. IN FAILING TO RE-ASSESS ITS SECOND OPINION ON REMAND, THE COURT BELOW HAS DECLINED TO FOLLOW THIS COURT'S INSTRUCTIONS AND IS IN CONFLICT WITH *Associated General Contractors* AND *Southaven Land Co.* v. *Malone & Hyde, Inc.*, IN FAILING TO REQUIRE THAT A PARTY MUST SUFFER

TRUE ANTICOMPETITIVE ANTITRUST INJURY IN ORDER TO HAVE ANTITRUST STANDING.

Correctly, the court of appeals admitted, following remand, that "our discussion of standing at 671 F.2d 885-890 [App. F, *infra* pp. 41a-50a] was faulty." App. I, *infra* p. 60a. Then, inappropriately, the panel wrote only a cursory two-page *per curiam* opinion that neither addresses petitioners' arguments regarding antitrust standing nor applies *Associated General Contractors* to those assertions.

In *A.G.C.*, this Court held that the "nature of the plaintiff's alleged injury" is a factor that "may be controlling" in determining antitrust standing under section 4 of the Clayton Act. 103 S.Ct. at 908. "In each case [plaintiff's] alleged injury must be analyzed to determine whether it is of the type the antitrust statute was intended to forestall. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, [429 U.S. 477, 487-88 (1977)]." 103 S.Ct. at 910. Thus, this Court confirmed petitioners' long-standing contention that "antitrust injury" is an essential element of "antitrust standing," *i.e.*, that "antitrust injury" must be analyzed as part of *plaintiff's standing*, not as part of *defendant's alleged violation. Accord, Merican, Inc. v. Caterpillar Tractor Co.*, 1983-2 Trade Cas. (CCH) ¶65,511 at 68,487 n.11 (3d Cir. Jul. 26, 1983).

If the court below had properly applied this rule of standing, it would have been compelled to affirm the district court's order dismissing the case. The gravamen of Industrial Investment's complaint, as laid out in specific, detailed allegations, is that it has been displaced by Mitsui as the sole purchaser of logs from Telaga Mas.[5] Thus, the complaint itself alleges merely an injury

[5] Industrial Investment alleges, but without any corroborative allegations of specific facts, that as a result of the displacement Mitsui "monopolized the relevant market." App. F, *infra* p. 50a n. 16. Mitsui, however, resells its logs in Japan, *id.* at 37a, and Industrial

that is *not* of a "type the antitrust laws were intended to prevent."

Under the Sherman Act, "the prohibited acts are those with a threatened impact on competition." *Multiflex, Inc.* v. *Samuel Moore & Co.*, 709 F.2d 980, 986 (5th Cir. 1983). But the mere substitution of one buyer for another is not anticompetitive.[6] In the competition between Mitsui and Forest Products for exclusive access to the logging concession operated by Telaga Mas, only one rival could win. Of necessity, the other rival would suffer a commercial defeat. But the commercial defeat that a potential buyer suffers when it loses access to a particular supplier is merely an injury *from* competition.[7] As such, it is a result of, and promotes, competition and consequently is not injury "of the type the antitrust laws were intended to forestall." *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 484 n. 21 (1982). It therefore does not confer standing to sue under section 4 of the Clayton Act.[8]

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Investment has made no colorable allegation that Mitsui has foreclosed competition in the Japanese lumber market as a consequence of its access to the Indonesian logging concession operated by Telaga Mas.

[6] A seller, such as Telaga Mas, has "a unilateral right to select its customers and to refuse to sell its goods to anyone ...." *Mendelovitz* v. *Adolph Coors Co.*, 693 F.2d 570, 575 n. 9 (5th Cir. 1982). *See generally United States* v. *Colgate & Co.*, 250 U.S. 300 (1919).

[7] The gist of Industrial Investment's complaint appears to be that although the injury was from competition, the competition was unfair. But the "substitution of one competitor for another by means of unfair competition is not in itself a violation of the antitrust laws." App. F, *infra* p. 50a n. 16. *A.G.C.* now has confirmed petitioners' assertion that unfair competition is "plainly not subject to review under the federal antitrust laws." 103 S.Ct. at 902-03.

[8] "Antitrust legislation is concerned with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise." *Quality Foods of Centro America, S.A.* v. *Latin American Agribusiness Development Corp.*, 1983-2 Trade Cas. ¶65,532 at 68,641 n. 11 (11th Cir. Aug. 8, 1983).

But in its most recent, *per curiam* opinion, the court of appeals does not even mention the question of competitor substitution. Instead, it focuses upon the "directness" of the injury, App. I, *infra* pp. 60a-61a, which, as part of the "target area" test, is an approach that has been called into question by *Associated General Contractors*. *See* 103 S.Ct. at 907-08 n. 33. The court of appeals misses the mark in reading *A.G.C.* as only a "directness" case involving "duplicate recovery or complex apportionment of damages." App. I, *infra* p. 61a.

*A.G.C.* teaches much more. It refines and reiterates the holdings of *Brunswick* and *McCready* that courts look not merely to whether a plaintiff was hurt in some way, but to whether plaintiff's injury is something Congress sought to prohibit. A plaintiff not hurt in a *prohibited* way has no standing (although a different plaintiff arguably might).

By failing to reassess the entire antitrust standing question, the Fifth Circuit is in conflict with *Southaven Land Co.* v. *Malone & Hyde, Inc.*, 1983-2 Trade Cas. ¶65,564 (6th Cir. Aug. 23, 1983). Recognizing that "[r]e-examination of this circuit's § 4 "standing" doctrine . . . is mandated by . . . *McCready* . . . and . . . *Associated General Contractors*," *id.* at 68,801, the Sixth Circuit focuses upon the *pro-competitive* intent of Congress. "Although [plaintiff's] injury may be a tangential by-product of [defendant's] averted monopolistic conduct, such injury is not inextricably intertwined to any injury inflicted upon the relevant market . . . . [Plaintiff's] injury is not sufficiently linked to the pro-competitive policy of the antitrust laws." *Id.* at 68,804.[9] Thus, if there is no harm to competition, plaintiff has no antitrust standing.

The gravamen of respondents' complaint is simply that, as a result of actions taken abroad, petitioners, not they, obtained the

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[9] Moreover, plaintiffs' injury, as in the instant case, "is remedial under other laws, namely, contract law." *Southaven*, 1983-2 Trade Cas. at 68,805 (citing *Associated General Contractors*).

sole source of logs represented by this one small concession in Indonesia. That is hardly enough to confer *antitrust* standing in an American court.

The instant case is ripe for a further explication of antitrust standing and to redress the court of appeals' misuse of *A.G.C.* Unlike *McCready*, *Associated General Contractors*, or *Merican*, this case does not present, as to this element of the standing issue, problems of complex damage apportionment, duplicate recovery, or a "target area" analysis. It gives the Court an opportunity to address the antitrust standing issue where there is no question of the directness of the impact on the plaintiffs but where defendants' acts, if anything, *promoted* competition (albeit in a foreign market).[10]

In the alternative, this Court could again remand this case to the court below with instructions to make the competitor-substitution inquiry which the court in its most recent opinion entirely overlooked and to engage in a thorough post-*Associated General Contractor* analysis like that in *Merican*.[11] This would rectify in

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[10] Additionally, the opinion violates a central tenet of *A.G.C.* by adopting "a construction of the amended complaint which is somewhat broader than the allegations in the pleading itself." *A.G.C.*, 103 S. Ct. 902. For example, the opinion asserts that defendants denied plaintiffs their source of supply. But nowhere do plaintiffs allege that defendants prevented them from purchasing logs other than those from the one small concession controlled by Telaga Mas. "It is not . . . proper to assume that [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Associated General Contractors*, 103 S.Ct. at 902. As in *A.G.C.*, "the complaint is insufficient . . . . A district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." 103 S. Ct. at 900, 903 n. 17. But the Fifth Circuit panel made no effort, on remand, even to acknowledge, much less to apply, the strict pleading requirements of *A.G.C.*

[11] *See also Construction Aggregate Transport, Inc.* v. *Fla. Rock Industries, Inc.*, 710 F.2d 752 (11th Cir. 1983) (thorough re-analysis of antitrust standing in light of *McCready* and *Associated General Contractors*).

part the panel's failure to follow this Court's previous instructions.

2. THE COURT OF APPEALS' SECOND OPINION DIRECTLY CONFLICTS WITH THOSE OF THE SECOND AND SEVENTH CIRCUITS IN *National Bank of Canada* v. *Interbank Card Association* AND *Bunker Ramo Corp.* v. *United Business Forms, Inc.*

In the view of the court of appeals, in its second opinion, an alleged foreign restraint of trade is within the scope of the Sherman Act so long as it "directly or substantially affects the flow of commerce into or out of the United States . . . ." App. F, *infra* p. 36a. The court reasoned accordingly that the Sherman Act extends to the transactions at issue in this case merely because logs originating in Indonesia and thereby potentially available to the United States market had beenimported instead into Japan.

The jurisdictional standard thus applied is far too loose. While it could, perhaps, be said that the importation of logs into Japan "affects" commerce of the United States in some attenuated sense, *e.g.*, in the same sense that a farmer's consumption of home-grown wheat was said to "affect" *interstate* commerce in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), Congress cannot be understood as having intended to extend the reach of American antitrust laws into foreign territories on the basis of such tenuous connections with American commerce.[12] Applying the reasoning of the court of appeals, a right to bring an action for treble damages in courts of the United States could arise from practically any international competition anywhere in the world.

In holding that an Indonesian logger's substitution of one exclusive buyer for another is within the reach of American antitrust laws, merely because the disappointed buyer has alleged that it might have imported some of the logs into the United

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[12] *See generally, e.g.*, Rahl, *American Antitrust and Foreign Operations: What Is Covered?*, 8 CORNELL INT'L L.J. 1 (1974).

States, the Fifth Circuit has gone far toward converting the Sherman Act into a worldwide charter for bringing foreign business disputes before American courts. If this local Indonesian matter implicates American antitrust law, almost any foreign commercial dispute can be made justiciable in the United States with the aid of cleverly drafted pleadings. "The flow of litigation into the United States would increase and further congest already crowded courts." *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 252 (1981). The American judicial system is ill-equipped to act as the international arbiter of international commerce, and Congress has not thrust that role upon it.

The Fifth Circuit in this case erred in failing to require at least a plausible allegation of a significant *anticompetitive* effect upon United States commerce before asserting jurisdiction. Its decision conflicts with that of the Second Circuit in *National Bank of Canada*, in which the Second Circuit drew upon this Court's decision in *Brunswick* and upon Judge Learned Hand's opinion in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), to define with care the proper jurisdictional limits of American antitrust laws:

> [T]he inquiry should be directed primarily toward whether the challenged restraint has, or is intended to have, any *anticompetitive* effect upon United States commerce. . . .
>
> Our jurisdiction is not supported by every conceivable repercussion of the action objected to on United States commerce. Only those injuries to United States commerce which reflect the *anticompetitive* effect either of the violation or of anticompetitive acts made possible by the violation constitute effects sufficient to confer jurisdiction. . . . [T]here must be at least *some anticompetitive effects* to meet the threshold requirement of jurisdiction.

*National Bank of Canada* v. *Interbank Card Association*, 666 F.2d 6, 8 (2d Cir. 1981) (some emphasis added).

If the Fifth Circuit had applied the standard articulated by the Second Circuit, it would have concluded that this Indonesian dispute was not within the reach of the Sherman Act. In *National Bank of Canada*, the exclusion of a firm from the entire Canadian national market did not pose "a foreseeable threat to United States commerce of a type sufficient to justify assertion of jurisdiction." *Id.* at 9. *A fortiori*, exclusion of Industrial Investment from a single Indonesian logging concession does not entail the kind of anticompetitive effect upon United States commerce that would warrant the exercise of jurisdiction by an American court.[13]

The opinion of the Fifth Circuit also conflicts with that of the Seventh Circuit in *Bunker Ramo Corp.* v. *United Business Forms, Inc.*, 1983-2 Trade Cas. (CCH) ¶ 65,515 (7th Cir. July 26, 1983). Agreeing with defendants' contention that plaintiff was "attempting to characterize what is merely a common law fraud as an antitrust injury," 1983-2 Trade Cas. at 68,526, the court held that, in a domestic context, a plaintiff must "show *anticompetitive effects*, or *actual harm to competition*, to establish an antitrust violation and a cause of action." *Id.* at 68,527 (emphasis added). "It is not the unfair means the defendants employed that is to be the focus of the inquiry, but whether those means *"lessened competition."* *Id.* (emphasis added). The Seventh Circuit therefore reversed the district court's refusal to dismiss the antitrust count because "[p]laintiff has not alleged any anticompetitive effect arising from the defendants' conduct . . . ." *Id.* at 68,528. By requiring only "effect" rather than

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[13] Plainly, the fact that Mitsui's American subsidiary was the nominal purchaser of logs from Telaga Mas is not enough to establish jurisdiction. In *National Bank of Canada*, there was an "American actor clearly involved in this action," 666 F.2d at 9, but that properly was deemed irrelevant to the jurisdictional analysis. A complaint must be dismissed where "the joint venture opportunities at the heart of plaintiff's antitrust claim are centered, and have their effect, solely outside United States' commerce." *Power East Ltd.* v. *Transamerica Delaval Inc.*, 558 F.Supp. 47, 49 (S.D.N.Y. 1983).

"*anticompetitive* effect," the opinion below conflicts with that of the Seventh Circuit both because there is no jurisidiction and because plaintiffs have failed to state a cause of action under the Sherman Act.

The position taken by petitioners in regard to extraterritorial jurisdiction is akin to their view of standing in that both positions urge the Court to find *anticompetitive* effect on American commerce before permitting a massive case to proceed. The mere substitution of petitioners for respondents in Indonesia has no effect upon American *competition*, as opposed to American *competitors*, and hence confers neither jurisdiction nor standing. This case gives the Court the opportunity to address the interaction of jurisdiction and standing in the context of the *pro-competitive* designs of Congress.

Finally, the need for uniform rules of decision is especially acute under the antitrust laws, because of a plaintiff's freedom to choose its forum. *See* section 12 of the Clayton Act, 15 U.S.C. § 22. This Court should grant review of this case to resolve the conflict between the circuits and thereby ensure that the extraterritorial application of the Sherman Act to international commercial disputes will be governed by a uniform rule, no matter where a plaintiff chooses to sue.[14]

3. THE COURT OF APPEALS'S FIRST OPINION CONFLICTS WITH THOSE OF THE SECOND AND NINTH CIRCUITS REGARDING THE SCOPE OF THE ACT OF STATE DOCTRINE.

The holding below, that courts of the United States may determine the extent to which a foreign government's official acts may have been caused by alleged antitrust violations, is in conflict with the recent decisions of the Second and Ninth Circuits in *Hunt* v. *Mobil Oil Corp.*, *Occidental Petroleum Corp.* v.

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[14] In a case with facts virtually identical to those alleged in the instant case, also involving a foreign natural resource concession, a district court held that there was no extraterritorial jurisdiction. *See El Cid, Ltd.* v. *N.J. Zinc Co.*, 551 F. Supp. 626 (S.D.N.Y. 1982).

*Buttes Gas & Oil Co.*, and *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, and is inconsistent with the principles that this Court enunciated in *American Banana Co.* v. *United Fruit Co.*

Whether American courts may inquire into and determine the reasons and motives underlying a foreign government's official acts is a question of substantial importance both to the conduct of this nation's foreign policy and to the administration of the antitrust laws. American corporations engage in widespread business activities throughout the world, and foreign governments have assumed an ever-expanding role as regulators of and participants in such activities. Private antitrust actions arising from international business activities will increasingly implicate the official acts of foreign states. In view of the decision below, the lower courts stand in need of this Court's guidance concerning whether they are free to scrutinize the wisdom, integrity, motivation, or propriety of such official acts.

When *Hunt* was pending on petition for a writ of certiorari, the United States, as *amicus curiae*, advised the Court that it should take the case to decide "the important issue whether the act of state doctrine bars judicial examination of the motives behind a foreign government's official acts." Brief for the United States as Amicus Curiae, at 7 (No. 76-1403). In the instant case the United States, again as *amicus curiae*, urged that this Court grant certiorari to resolve the conflict. "The growing importance of international trade and investment to the Nation's economy and the participation of foreign governments in those transactions underscore the need for a clear and authoritative exposition of the act of state doctrine." Brief for the United States as Amicus Curiae, at 6 (No. 79-552). Although this Court denied certiorari, the need for resolution of the conflict has grown in the ensuing four years.

Here, respondents seek loss of profits they allegedly would have received from the joint operation, with Telaga Mas, of a logging business on the concession in question. Since the forests of Indonesia are owned by that government and carefully controlled by it, any such business must obtain a long series of approvals, licenses, and the like before it can hope to begin operation. As a matter of antitrust law, respondents must first establish the *fact of antitrust damage*. E.g., *J. T. Gibbons, Inc.* v. *Crawford Fitting Co.*, 704 F.2d 787, 791 (5th Cir. 1983). In that regard, respondents cannot recover any damages for lost profits without first showing that, *but for* petitioners' alleged acts, the Indonesian Government would have allowed them to operate. In other words, respondents must show that petitioners' acts, not respondents' inexperience or unpreparedness or any political or economic factors, caused the Indonesian Government to terminate respondents' rights by (1) withdrawing approval of the joint venture, (2) refusing to reinstate that approval, and (3) failing to issue the required logging concession and tree-cutting rights. Inevitably, the motivation or reasoning of the Indonesian Government is called into question by this indispensable *but for* analysis.

Petitioners contend that respondents' paper venture failed because the Indonesian Government, in the role of a sovereign in control of its own natural resources, and for reasons known only to itself, decided to nullify the joint venture, which was to operate under the *Foreign* Capital Investment Law of Indonesia, and to award the concession and licenses to an Indonesian company (Telaga Mas) alone under the *Domestic* Capital Investment Law.[15] Respondents, on the other hand, allege that petitioners

[15] Petitioners also assert that respondents were mere paper organizations, unprepared and unable to operate the proposed business; had been unable to arrange adequate financing; and had not taken many of the preliminary steps required by Indonesian law. If an inquiry were made into governmental motivation, petitioners would show

directly "destroyed" respondents' business so that the Indonesian Government was forced to cancel respondents' project.[16]

These conflicting factual assertions cannot be resolved without an inquiry into what caused the appropriate Indonesian Government officials to act as they did — *i.e.*, what was their *motivation* in terminating respondents' deal regarding state-owned natural resources. That is precisely the inquiry held to be barred by the Act of State Doctrine in *Hunt*, in *Buttes*, and in *Clayco*.

In *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) the factual issue was whether defendants' alleged wrongdoing had caused Libya to nationalize plaintiffs' petroleum concessions.[17] The Second Circuit held that the Act of State Doctrine precluded examination of the motives of that government in the handling of its natural resources. The court below openly rejected *Hunt*, asserting that only validity, but not motivation, is within the ambit of the Doctrine: "[W]e disagree that motivation and validity are equally protected by the act of state rubric." App. B, *infra* p. 22a. But the Second Circuit already had recognized that the distinction drawn by the Fifth Circuit between validity and motivation is wholly artificial.

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that these factors, *inter alia*, caused the Indonesian Government to act as it did.

[16] Factually, this theory is called into question by respondents' written protests to Indonesian Government officials claiming that the government was responsible for spoiling their deal.

[17] The plaintiffs in *Hunt*, like respondents here, asserted that their injury was independent, and in advance, of any act of state:

> The complaint alleges only that private companies conspired against Hunt. They caused Hunt to take actions based upon assurances and promises that were made to be broken. They damaged Hunt wholly apart from the nationalization, and if the final coup de grace was administered by Libya, it was because of the manner in which respondents manipulated the conduct — not of the Libyan government — but of their fellow signatories . . .

Petition for a Writ of Certiorari, at 24-25 (No. 76-1403).

As a matter of international comity, either inquiry is offensive. Moreover, as in *Hunt*, respondents' attempts in their pleadings to avoid the impact of the Act of State Doctrine should be recognized for what they are:

> However, while the skilled pleader here has meticulously attempted to avoid the issue of validity, its claim is admittedly not viable unless the judicial branch examines the motivation of the Libyan action and that inevitably involves its validity ... [W]e cannot logically separate Libya's motivation from the validity of its seizure. The American judiciary is being asked to make inquiry into the subtle and delicate issue of the policy of a foreign sovereign, a Serbonian Bog, precluded by the act of state doctrine as well as the realities of the fact finding competence of the court in an issue of far reaching national concern.

550 F.2d at 77.

In *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 1983-2 Trade Cas. ¶ 65,523 (9th Cir. Aug. 2, 1983), the facts are similar to those here, but with a contrary result in the court of appeals. Defendants were charged with making secret payments to a foreign government official to obtain an oil concession. A United States Government investigation revealed that the payments (bribes) had been made. Citing *Hunt* and *Buttes*, the Ninth Circuit, acknowledging that "the concern here is the motivation behind the sovereign's act, rather than its legal validity," held that American "judicial scrutiny of sovereign decisions allocating ... exploitation of important natural resources ... would embarrass the political branches of our government in the conduct of foreign policy." *Id.* at 68,598.[18]

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[18] *Clayco* attempts to distinguish the opinion below on the ground that here, governmental activity supposedly forms only the background of the factual nexus. 1983-2 Trade Cas. at 68,598. As explained above, however, the decisions of the Indonesian Government were central to respondents' success or failure. Additionally, *Clayco* reads the opinion below as permitting examination of motivation only as to the *amount* of damages. *Id.* But such an inquiry would be equally

In *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972), the Ninth Circuit concluded that the Act of State Doctrine bars inquiry into the question whether defendants' acts caused a foreign ruler to cancel an oil drilling concession which he earlier had granted to the plaintiffs. This decision, forbidding any inquiry into motivation, plainly is at odds with the holding below.[19]

Apart from its conflict with *Hunt*, *Buttes*, and *Clayco*, all involving natural resource concessions, the Fifth Circuit simply erred in divining the scope of the Act of State Doctrine. As far back as its decision in *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909), this Court has asserted that "the decree of the sovereign makes law" and that American courts should not look behind such decisions. *Id.* at 358.[20] An inquiry into motivation may be particularly offensive and disruptive by calling into question the wisdom, judgment, probity, and consistency of foreign officials.

The real issue in any case involving a foreign act of state is whether that act is to be accepted as a "given" in resolving the private parties' dispute. This Court already has decided that point: "When it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 309 (1918). It necessarily follows here that the denial of necessary approvals by the Indonesian Government must be accorded "an

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harmful as a matter of foreign relations. The essential question is *whether* the offensive inquiry is made, not the reason for it.

[19] *Accord*, *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 607 (9th Cir. 1977) (inquiry into motivation prohibited).

[20] *American Banana's* act of state holdings are still good law. *See Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 416 (1964).

irrebuttable presumption of validity," *Phoenix Canada Oil Co.* v. *Texaco Inc.*, 560 F.Supp. 1372, 1381 (D. Del. 1983), and their reasons may not be examined. The resulting foreclosure of any legal interest which respondents might otherwise have had in the concession also cannot be examined, and respondents cannot recover for their alleged loss of profits.

In the four and one-half years since the Act of State ruling below, the courts have split on the validity/motivation question regarding the Act of State Doctrine. Indeed, in a different case, another panel of the Fifth Circuit has squarely held that inquiry into motivation is prohibited. *Arango* v. *Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1380-81 (5th Cir. 1980) (citing *Hunt* with approval). To the contrary is *Northrup Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030, 1048 (9th Cir. 1983).

The uncertainty existing in the present state of the law is recognized in *Williams* v. *Curtiss-Wright Corp.*, 694 F.2d 300, 304 n. 5 (3d Cir. 1972) (dictum), which is critical of *Hunt*. Thus, the need for resolution of the conflict is even greater now than when the Solicitor General previously recommended that certiorari be granted here and in *Hunt*. The motivation question was presented but not decided last term in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 103 S. Ct. 2591, 2604 n. 28 (1983). This Court has not spoken comprehensively on the Act of State Doctrine in almost twenty years, *see Banco Nacional de Cuba* v. *Sabbatino*, but should do so now.[21]

4. THE COURT BELOW HAS IMPOSED AN UNPRECEDENTED RESTRICTION UPON THE DOCTRINE OF COMMON-LAW *forum non*

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[21] Of course, the prior denial of certiorari is no bar to consideration of the question now. *Mercer* v. *Theriot*, 377 U.S. 152, 153 (1964); *Hughes Tool Co.* v. *Transworld Airlines*, 409 U.S. 363, 364 n. 1, 366 (1972).

*conveniens*, THUS RAISING AN ISSUE THAT HAS NEVER BEEN BUT SHOULD BE DECIDED BY THIS COURT.

The decision below is the only appellate opinion ever to have held that the doctrine of common-law *forum non conveniens* is inapplicable in *antitrust* cases involving a relocation to a *foreign* forum. App. F, *infra* p. 50a. This is a question that has never been, but should be, squarely addressed by this Court, in light of its recent opinion in *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981). There, this Court made it clear that common-law *forum non conveniens* is a viable, useful doctrine to be exercised, as below, in the discretion of the district court, even where the plaintiff may be deprived, as in *Piper* and arguably here, of one of its causes of action and of certain measures of recovery. 454 U.S. at 249-51.

The Fifth Circuit held below, however, that the doctrine could not be utilized because respondents, who also assert common-law contract and tort claims under the laws of Indonesia, might be deprived of their *antitrust* claims in the courts of Indonesia. App. F, *infra* p. 52a-53a. This reasoning contravenes *Piper*.[22]

Under *Piper*, it is uncontroverted that common-law *forum non conveniens* can be utilized to dismiss a *non-antitrust* case in favor of a foreign forum. In *United States* v. *National City Lines, Inc.*, 337 U.S. 78 (1949), this Court held that Congress, in adopting 28 U.S.C. § 1404(a), intended that an *antitrust*

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[22] In fairness to the Fifth Circuit, petitioners note that *Piper* was decided after oral submission in this case. Under FED. R. APP. P. 28(j), petitioners had no opportunity to argue the significance of the case but were able only to call its existence to the attention of the panel. Following remand, however, petitioners requested permission to brief intervening cases in addition to *A.G.C.* and to brief fully the *Noerr-Pennington* issue raised by *Coastal States Marketing, Inc.* v. *Hunt*. *See supra* note 2. That request was denied.

plaintiff's choice of forum can be disturbed in favor of a *domestic* forum by use of the doctrine of *forum non conveniens*. 337 U.S. at 84.[23]

It remains only for this Court to combine the reasoning of *National City Lines* with that of *Piper*, to hold that *forum non conveniens* is available where both an *antitrust* claim and a *foreign* forum are involved. Such a conclusion would seem compelled by the well-heralded pronouncement in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 507 (1947), that "a court may resist imposition upon its jurisdiction" even where a statute specifically affords venue, where "the litigation can more appropriately be conducted in a foreign tribunal." *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U.S. 413, 423 (1932).

In this case, respondents assert some claims based upon Indonesian law, as well as common-law counts for breach of contract and in the nature of unfair competition.[24] The inability to assert Sherman Act claims will not leave respondents without

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[23] This was the second *National City Lines* opinion. *See* App. F, *infra* p. 52a n. 18. Petitioners assert that the first opinion, *United States* v. *National City Lines, Inc.*, 334 U.S. 573 (1948), was rendered inapplicable by the passage, in the interim between the two decisions, of 28 U.S.C. § 1404(a), which is an overt expression of Congressional policy that an antitrust plaintiff's choice of forum can be disturbed. The Court should grant review in order to resolve this uncertainty.

[24] The district court already has held that the non-federal claims are governed by Indonesian, not Texas, law. App. E, *infra* p. 29a. Whether or not this holding continues to be law of the case, the wisdom of the district court's ruling is confirmed by the Texas Supreme Court's recent conflict-of-laws holding that "the law of the state with the most significant relationship to the particular substantive issue" will be applied. *Duncan* v. *Cessna Aircraft Co.*, 26 Tex. Sup. Ct. J. 507, 510 (July 13, 1983). This holding only strengthens petitioners' contention that Texas is an inconvenient forum and that this case belongs in Indonesia. An action should be dismissed under *forum non conveniens* where the court will have to "untangle problems in conflict of laws, and in law foreign to itself." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. at 509.

a remedy if their "Indonesian law" and other claims have any merit. The same was true for the plaintiffs in *Piper*.

The Fifth Circuit erred in treating *forum non conveniens* solely as a matter of venue, *i.e.*, in ignoring its *jurisdictional* aspects. This Court in *Piper* has recently reminded us that the doctrine of *forum non conveniens* "is designed in part to help courts avoid conducting complex exercises in comparative law," 454 U.S. at 251, and to avoid "the enormous commitment of judicial time and resources," *id.* at 261, lest "the flow of litigation into the United States would increase and further congest already crowded courts." *Id.* at 252.[25] A grant of certiorari is justified to permit this Court an opportunity to explicate its recent pronouncements in *Piper* in the context of a federally-created cause of action such as that asserted here, and to reconcile the holding below with well-settled Supreme Court law.[26]

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[25] *Piper* calls for great deference to the discretion of the district court in a *forum non conveniens* determination. 454 U.S. at 257. A further reason for upholding the district court's exercise of discretion here is that *before this suit was filed in Houston, Texas, the Telaga Mas internal dispute was fully litigated in Indonesian courts*, where the controversy belongs. Respondents should not be permitted now to initiate a new round of litigation in American courts.

[26] In the alternative, this Court could remand for a full review of *forum non conveniens* factors in light of *Piper*, although reversing and rendering seems more appropriate.

## CONCLUSION

Of the four issues presented here, three present conflicts with decisions of this Court or between the circuits, and the fourth is an important issue that has never been addressed by this Court. Together, the issues provide the Court with an opportunity to clarify enforcement of the Sherman Act in light of Congressional intent to proscribe only *anticompetitive* acts and with a further opportunity to enunciate guidelines for the imposition of American courts upon foreign transactions. A writ of certiorari should issue to review the judgments and opinions of the Fifth Circuit.[27]

Respectfully submitted,

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September 8, 1983

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[27] Petitioners' requests for a stay to permit filing and consideration of the instant petition for writ of certiorari have been denied, and discovery is continuing. Accordingly, petitioners request that a stay of further district court proceedings be issued to accompany any writ of certiorari.

**APPENDIX A**
**OPINION**
**Of the**
**United States District Court**
**For the**
**Southern District of Texas**
**February 28, 1979**

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In The
UNITED STATES DISTRICT COURT

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FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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INDUSTRIAL INVESTMENT DEVELOPMENT CORP., ET AL.
V.
MITSUI & CO., LTD., ET AL.

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CIVIL ACTION NO. 75-H-1041

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Butler, Binion, Rice, Cook & Knapp (Louis Paine), Houston, Texas, and Austin, Arnett, Northrop, Kirkpatrick & Steber (Fitzhugh H. Pannill, Jr.), Houston, Texas, attorneys for Plaintiffs.

Fulbright & Jaworski (B. J. Bradshaw), Houston, Texas, attorneys for Defendants Mitsui & Co., Ltd. and Mitsui & Co. (U.S.A.), Inc.

FEBRUARY 28, 1978

MEMORANDUM AND ORDER:

This is an antitrust action brought in United States District Court to rectify alleged commercial mischief abroad. Defendants have move to dismiss this action on five grounds:

(1) Plaintiffs lack standing since they have incurred only derivative damage as shareholders;

(2) The extraterritorial effect of American antitrust laws does not extend so far as to reach this case;

(3) Plaintiffs are not within the "target area" of protection afforded by the antitrust laws;

(4) Forum Non Conveniens;

(5) Act of state doctrine.

From a study of the pleadings, and with the benefit of seven volumes of exhibits accompanying the exhaustive briefs of parties, it is the opinion of this court that the act of state doctrine precludes judicial review of this case, therefore the other prongs of Defendants' motion need not be reached. Plaintiffs have also alleged claims of conversion, misappropriation, interference with contractual and business relationships, and breach of contract seeking to invoke pendent jurisdiction. There being no substantial federal claim, these other causes of action will also be dismissed for lack of jurisdiction.

The court has considered the mountainous stack of exhibits in reaching its decision, therefore it will give Rule 56, Fed.R.Civ.P., treatment to the Rule 12(b)(6) motion to dismiss. Although the granting of such motions in complex antitrust litigation is not favored, *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486 (1962), the complexity of such litigation is often unnecessarily developed, and the court is convinced that there are no factual disputes in this case as to the few essential facts underpinning this decision. Those facts are as follows.

The American link on the Plaintiffs' side is Industrial Investment Development Corporation (IIDC), a Virginia corporation. IIDC is the beneficiary of a trust held by Lex LTD and Rex LTD. The corpus of the trust is the Indonesia Industrial Investment Corporation Ltd. (IIIC), a Hong Kong corporation. IIIC wholly owns another Hong Kong corporation, Forest Products

Corp. Ltd. (FPC) which is the principal actor in this Indonesian affair. These three corporations are the Plaintiffs in this suit.

Plaintiffs sought to enter the logging and lumber products business in East Kalimantan (Borneo), Indonesia. The forests in Indonesia are owned by the Indonesian government. That government requires any foreign enterprise to form a joint venture with an Indonesian partner before it will be allowed to do business in Indonesia. This joint venture must then form an independent Indonesian corporation by which business must be conducted. However, the formation of these business alliances does not give anyone the right to begin the harvesting of the lumber. A concession or cutting license must be granted from the government through its Department of Forestry.

Pursuant to these governmental requirements, FPC entered into a joint venture with an Indonesian corporation, Telaga Mas Kalimantan Co. (Telaga Mas). On July 1, 1971, FPC, Telaga Mas and the Indonesian Director General of Forestry entered into a Three Way Agreement by which terms were agreed upon as to the operating of the enterprise, if a cutting license were issued by the government. The Three Way Agreement provided for its own termination if no license issued. Ultimately no license was ever issued.

These facts are uncontroverted. Plaintiffs, however, would have the court shift its view from these facts to the more controversial allegations of conspiracy. Plaintiffs allege that the defendants infiltrated Telaga Mas executive suite [*sic*] and found a turncoat to poison the FPC-Telaga Mas marriage. Two shareholders meetings of Telaga Mas were held. Regardless of their validity and fairness, it is undisputed that the first meeting ratified the Three Way Agreement while the latter invalidated the agreement. The battleground then switched to the Indonesian courts. The first two lawsuits upheld the validity of the second shareholders meeting and declared the Three Way Agreement unenforceable. The final lawsuit, however, resulted

in a judgment that reversed the prior decision concerning the enforceability of the Three Way Agreement. In the meantime, the Director General of Forestry had cancelled the Three Way Agreement. Regardless of this cancellation and the ping-pong shareholders meetings and judgments, it is undisputed that a cutting license had never been and was never issued.

Plaintiffs contend that the poisoning of the FPC-Telaga Mas joint venture caused the cancellation of the Three Way Agreement which in turn caused the government to deny FPC a concession. It is this two step inquiry which is prohibited by the act of state doctrine. Once it is established that the harm complained of was ultimately caused by a governmental act, the motivation behind that act, no matter how unscrupulous, is beyond judicial review. This is the precise reasoning behind *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), where it was stated:

> "Hunt's complaint does not name Libya as a defendant or in any way suggest that it is a co-conspirator of the named defendants. Nonetheless Judge Weinfeld reasoned that the combination or conspiracy charged did not of itself cause the damage complained of but rather that the damage resulted from the action of Libya in cutting back Hunt's production, shutting off its oil and finally nationalizing its properties. Thus he found that Hunt would be required to establish that *but for* the conspiracy Libya would not have committed any of these aggressive actions. This he decided would require judicial inquiry into 'acts and conduct of Libyan officials, Libyan affairs and Libyan policies with respect to plaintiff's as well as other oil producers' properties and the underlying reasons for the Libyan government's actions.' 410 F. Supp. at 24. He concluded that this inquiry was foreclosed under the act of state doctrine."

Similarly, in *Occidental Petroleum Corp* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D.Cal. 1971), *aff'd* 461 F.2d 1261 (9th Cir. 1972), the court concluded that the foreign states' territorial

aggressiveness which ousted the plaintiff from a concession was the ultimate cause of the damage complained of, and therefore was barred from judicial review stating:

> "There is, moreover, a further dimension to this case's implication of foreign acts of state. Because a private antitrust claim requires proof of damage resulting from forbidden conduct, *e.g.*, *Foster & Kleiser Co.* v. *Special Site Sign Co.*, 85 F.2d 742, 750-751 (9th Cir. 1936), *cert. denied* 299 U.S. 613, 57 S.Ct. 315, 81 L.Ed. 452 (1937); *Winckler & Smith Citrus Products Co.* v. *Sunkist Growers, Inc.*, 346 F.2d 1012, 1014 & n.1 (9th Cir.), *cert. denied*, 382 U.S. 958 86 S.Ct. 433, 15 L.Ed.2d 362 (1965), plaintiffs necessarily ask this court to 'sit in judgment' upon the sovereign acts pleaded, whether or not the countries involved are considered co-conspirators. That is, to establish their claim as pleaded plaintiffs must prove, *inter alia*, that Sharjah issued a fraudulent territorial waters decree, and that Iran laid claim to the island of Abu Musa at the behest of the defendants. Plaintiffs say they stand ready to prove the former allegation by use of 'internal documents.' But such inquiries by this court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert. *See Sabbatino, supra*, 376 U.S. at 423-424, 431-433, 84 S.Ct. 923."

Therefore, regardless of the proof offered by the Plaintiffs as to a conspiracy to break up the FPC-Telaga Mas joint venture, it is evident that the whole issue of such a conspiracy is irrelevant since the damage complained of stems directly from the denial of a governmental concession to cut timber. Any inquiry into the reasons for such denial is barred by the act of state doctrine. The recent U.S. Supreme Court case, *Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. 682, 96 S.Ct. 1854 (1976) does not help Plaintiffs' case. *Dunhill* merely excluded from the act of state doctrine those acts of a sovereign which are purely commercial in nature. The court reasoned:

> "In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead they exercise only those powers that can also be exercised by private citizens. Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on national nerves." 96 S.Ct. at 1866.

The act in question here is the government denial of a concession to harvest logs which are owned by the government. This is not the type of act which *Dunhill* seeks to exclude as a purely commercial activity. *Dunhill* involved a plaintiff who paid funds to a Cuban government controlled corporation for the purchase of cigars. The cigar business was subsequently nationalized and the plaintiffs sued for the funds paid to the predecessor government controlled corporation. It was the failure to pay a commercial debt which the *Dunhill* court considered to be so entrepreneurial that the act of state doctrine would not apply. The same reasoning applies to *Timberlane Lbr. Co.* v. *Bank of America N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), in which the act of state doctrine was not applied to an enforcement by Hondurian officials of a judicial decree by which commercial security interests held by defendants were given recognition. It is the degree to which an American court must inquire into matters that turn on national political interests which triggers the act of state doctrine. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 84 S.Ct. 923 (1964). The denial of a concession to harvest government owned forests is a political, peculiarly governmental act of a sovereign. Perhaps the actions of the government in entering and terminating the Three Way Agreement may be considered commercial, proprietal acts, but the ultimate question as to the granting of the concession is purely a political issue barred from judicial review by the act of state doctrine.

The Plaintiffs had cleared a major hurdle in the forming of the three part agreement. However, this was only the beginning and despite any great expectations of the parties involved, the

delivery of the concession was still vulnerable to the whim of a foreign government. No guarantees were made. The forming of the three party agreement created no privileges in the land. In fact the continuity of the three party agreement was conditional on the granting of a concession. The government was at liberty at all times to grant or deny such a privilege. The motivation for their ultimate denial cannot be the basis of an antitrust suit pursuant to American laws. Therefore, it is

ORDERED that Defendants' motion to dismiss construed as a motion for summary judgment is hereby GRANTED and Plaintiffs' complaint is in all things DISMISSED.

DONE at Houston, Texas, this 28th day of February, 1978.

/s/ ROSS N. STERLING
UNITED STATES DISTRICT JUDGE

## APPENDIX B
## OPINION
## Of the
## United States Court of Appeals
## For the Fifth Circuit
## April 25, 1979

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, INDONESIA INDUSTRIAL INVESTMENT CORPORATION, LTD., AND FOREST PRODUCTS CORPORATION, LTD.,

*Plaintiffs-Appellants,*

v.

MITSUI & CO., LTD., AND MITSUI & CO. (U.S.A.), INC.

*Defendants-Appellees.*

No. 78-1775

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

APRIL 25, 1979

Fitzhugh H. Pannill, Jr., R. Hayden Burns, Houston, Tex., for plaintiffs-appellants.

Fulbright & Jaworski, B. J. Bradshaw, Rufus Wallingford, Jerry E. Smith, Houston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, CLARK and INGRAHAM, Circuit Judges.

* * *

CHARLES CLARK, Circuit Judge:

The sole issue in this appeal is whether the act of state doctrine precludes a trial of plaintiffs' antitrust action.[1] Plaintiffs

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[1] The named plaintiffs in this action are Industrial Investment Development Corporation (an American Corporation) and its two Hong Kong corporate subsidiaries, Indonesia Industrial Investment Corporation, Ltd., and Forest Products Corporation, Ltd. They are

claim damages from Mitsui & Co., Ltd., a Japanese corporation, and its American subsidiary, Mitsui & Co. (U.S.A.), Inc., for violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1 & 2, and Section 73 of the Wilson Tariff Act, 15 U.S.C.A. § 8. The complaint appended state law claims of tortious interference with contractual relations against these defendants and a breach of contract charge against the Indonesian defendant, P. T. Telaga Mas Kalimantan Co. Following extensive discovery, the district court granted defendants' motion for summary judgment. Defendants urged their motion on five grounds: (1) plaintiffs lack standing since they have incurred only derivative damage as shareholders; (2) the extraterritorial reach of American antitrust laws cannot grasp this case; (3) plaintiffs are not within the "target area" of antitrust law protection; (4) forum non conveniens; (5) act of state doctrine. The district court's decision was based solely on the ground that the act of state doctrine prevented judicial review of the federal claims.[2] Because of its ruling on federal claims, the district court exercised its discretion to dismiss the pendent state claims.[3]

The district court's invocation of the act of state doctrine in this case was in error. Although the regulations of a foreign state, Indonesia, formed part of the background to the activities alleged, neither the validity of those regulations nor the legality of the behavior of the Indonesian government is in question here. The mere fact that members of the Indonesian government were to play a part in the alleged scheme does not insulate defendants' accountability for conduct which might prove to be prohibited by our antitrust laws.

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collectively referred to as Industrial Investment or plaintiffs throughout this opinion.

[2] We express no opinion on the merits of assertions (1)-(4).

[3] Plaintiffs argue that independent diversity jurisdiction exists for the state claims. Because we find the federal claims justiciable, we need not resolve the dispute over the proper interpretation of the federal diversity statute, 28 U.S.C.A § 1332.

The present dispute evolves from plaintiffs' desire to enter the logging and lumber products business in East Kalimantan (Borneo), Indonesia. Late in the 1960's, the government of Indonesia began developing a plan for encouraging and regulating foreign private capital investment. The consequent Foreign Capital Investment Act provided for restrictions of private investment in certain fields, required the development of Indonesian manpower, and required opportunities for Indonesian co-ownership. Thus a foreign company could not conduct business within that country until it joined with a local company, and they together organized an independent limited liability company under Indonesian law. Known as P. T.'s (Perseroan Terbatas), these companies, which are closely analogous to American corporations, must have their organization approved by the government before they become effective.

Land use is also subject to regulation under the Act. A properly organized P. T. cannot harvest timber from the state-controlled land until it has been granted a concession and cutting license by the Department of Forestry pursuant to an application for forestry exploitation rights. The procedure contemplates preliminary surveys and negotiations between the applicant and the Director General of Forestry resulting in tentative concession rights embodied in a Forestry Agreement. The Agreement, accompanied by an Application Letter drafted by the P. T., is then to be submitted to the Minister of Agriculture within one month. Delay in submitting the Application Letter is considered grounds for revoking the Forestry Agreement. The Agreement and Letter must be channeled through the Department. Following approval and payment of a concession fee, the Director General of Forestry issues a formal concession decree and a license which establishes the new company and authorizes its logging operations, subject to revocation for failure to carry out

its obligations under the Forestry Agreement. Harvesting cannot begin until the license has been issued.[4]

In 1970 Industrial Investment[5] signed a joint venture agreement with Telaga Mas to harvest logs from a timber concession which had been granted to Telaga Mas in a government forest in Borneo. Under the agreement, Industrial Investment was to provide equipment, capital requirements and management, and supervisory and technical personnel. In exchange, Telaga Mas expressly agreed to cooperate in obtaining the necessary approvals for establishing the P. T. and securing the formal concession decree and cutting license.

Throughout the first six months of 1971 plaintiffs and Telaga Mas jointly negotiated with the Indonesian government for its approval of the proposed business. As a result, a Forestry Agreement was signed by the two companies and the Director General of Forestry on July 1, 1971. The Agreement set forth the capital, organization, and administrative requirements to be completed by the two firms before payment of the concession fee to the government and issuance of the cutting license to the newly formed P. T. The Agreement also contained provisions relating to the operation of the joint concession. More importantly, it reserved to the Department of Forestry the right to cancel for failure of the joint venture partners to cooperate or carry out their duties, and provided that cancellation of the joint venture agreement prior to the issuance of the license certificate would automatically terminate any rights of the parties to conduct lumbering operations. No license ever issued.

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[4] *See generally*, Republic of Indonesia, *Invest in Indonesia* (January 1972).

[5] Forest Products Corporation of Delaware, a predecessor company of Industrial Investment, conducted the initial negotiations. For clarity we refer to the American company as Industrial Investment throughout.

The district court refused to consider plaintiffs' allegations of a Sherman Act conspiracy since in its opinion the absence of an authorizing license governed the disposition of the case. Plaintiffs allege that the Mitsui defendants infiltrated and usurped control of the Telaga Mas management for the purpose of destroying plaintiffs' interest in the proposed logging concession. The complaint intricately details a plot, spawned from a 1972 increase in the price of timber, in which the Mitsui companies, past purchasers and creditors of Telaga Mas, decided first to eliminate Industrial Investment and then to protect its competitive edge by secretly taking direct supervision and control of the Telaga Mas operations for its own profit. Implementation of the scheme began when a shareholder group led by Harianto, a Telaga Mas official who was secretly backed by Mitsui, challenged the authority of Telaga Mas official [*sic*], Sadjarwo, to execute the Forestry Agreement on behalf of Telaga Mas. Separate competing shareholder meetings were held by Harianto and Sadjarwo, each affirming the corporate authority of the leader of its respective faction. Eventually an Indonesian court declared Harianto's group to be properly in power and nullified the joint venture agreement.

When the news reached the Director General of Forestry, he sent a letter to plaintiffs and to Telaga Mas in which he "cancelled and affirmed invalid" the Forestry Agreement. In the same letter, he invited plaintiffs and Telaga Mas under its newly declared leadership to execute a new agreement. The cancellation, plaintiffs argue, was the natural operation of the Agreement's automatic termination provisions.

In a separate action, a second Indonesian court subsequently held that Industrial Investment was not bound by the nullification order since it was not a party to that action. Harianto continued to rule Telaga Mas, however, and refused to honor or participate in the joint venture with plaintiff.

Industrial Investment contends that defendants' poisoning of the joint venture caused the cancellation of the Forestry Agreement which in turn caused the government to deny the concession. The district court found that the act of state doctrine prohibited such a "two-step inquiry." It concluded: "Once it is established that the harm complained of was ultimately caused by a governmental act, the motivation behind the act, no matter how unscrupulous, is beyond judicial review."

The act of state doctrine has arisen as a means of determining the appropriateness of adjudicating in a United States court a dispute which in some manner involves a foreign government. As classically stated:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

*Underhill* v. *Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897).

Early application of this doctrine was often muddled with the doctrine of sovereign immunity or principles of conflicts of law.[5] Since *Banco National de Cuba* v. *Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed. 2d 804 (1964), however, the doctrine has

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[5] In *Underhill*, for instance, the defendant Hernandez was acting as an agent for the sovereign [*sic*] in which the alleged torts occurred. Thus the result could be said to rest on the personal immunity of foreign sovereigns. *Note*, The Act of State Doctrine: Antitrust Conspiracies to Induce Foreign Sovereign Acts, 10 Int'l Law and Politics 495 (1978). *See Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726 (1918); *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909). *See also, Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. 682, 705 n. 18, 96 S.Ct. 1854, 1866-67 n. 18, 48 L.Ed. 2d 301 (1976). There is some authority that the doctrine still reflects conflicts of laws principles. This position assumes the validity of a foreign state's acts under the laws of that state. Applying the foreign laws to those acts, therefore, precludes an inquiry by American courts into their validity. See Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, 77 Colum. L. Rev. 1247 (1977).

emerged as independently based on concerns of separation of powers. The *Sabbatino* Court, cautious of judicial interference in executive affairs, refused to adjudicate the validity of expropriation by the Cuban government of property within its own territory owned by American nationals.[7] Its decision was based on several factors which pointed to the executive branch as the more appropriate tribunal to deal with the sensitive political issues. All related [*sic*] to the possible adverse consequences of an American court [sic] attempting to resolve the validity of title to property not within its jurisdiction or to judge a foreign state's power to expropriate the property of aliens. Of significance is the Court's express refusal to lay down "an inflexible and all-encompassing rule" of judicial abstention in every case not totally isolated to this country. 376 U.S. at 428, 84 S.Ct. at 940. Instead, it declared a less brittle doctrine, one with the "capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." 376 U.S. at 427-28, 84 S.Ct. at 940. Relying on traditional political question reasoning, it found that the doctrine was not constitutionally compelled but that it rested on "'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers." 376 U.S. at 423, 84 S.Ct. at 938.[8] *Sabbatino's*

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[7] Although *Sabbatino's* bar against claims based on the asserted invalidity of Cuban confiscations has been legislatively overruled by the "Hickenlooper Amendment," Foreign Assistance Act § 301(d)(4), 22 U.S.C.A. § 2370(e)(2)(1970), the case is still the leading authority on the act of state doctrine.

[8] Recently this circuit refused to rule on an act of state defense in a suit presenting conflicting claims to oil extracted from the *Persian Gulf. Occ. of Umm al Qaywayn* v. *A Certain Cargo*, 577 F.2d 1196 (5th Cir. 1978). Because the action required a determination of sovereignty over the well area, the case was dismissed as a nonjusticiable political question. In a brief discussion of the source of the act of state doctrine, we noted that the "better view would be that the doctrine is constitutionally compelled by the concept of separation of powers and placement of plenary foreign relations powers in the executive." 577 F.2d at 1200-01 n. 4.

"proper distribution" depended on several factors, which concerned the ramifications of judicial intervention on executive conduct of international relations or of inconsistent judicial and executive behavior.

The Supreme Court has recently reaffirmed this policy of balancing executive and judicial concerns in *Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). Because the Court "decline[d] to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations," *Dunhill* has become known as the "commercial exception" to the act of state doctrine. Dunhill had mistakenly made an overpayment to Cuba for cigars purchased from expropriated cigar businesses. The Court permitted adjudication of his claim of debt against Cuba:

> [S]ubjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts. In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns . . . Subjecting them in connection with such acts to the same rules of law that apply to private citizens is unlikely to touch very sharply on "national nerves."

425 U.S. at 703-04, 96 S.Ct. at 1866 (footnote omitted). Industrial Investment has urged application of this "Commercial exception" to the Indonesian licensing structure. We need not reach the merits of this contention.[9]

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[9] A majority of the Court never supported a broad "commercial act" exception to the act of state doctrine. Justice Stevens specifically omitted this part in his concurrence to Justice White's majority opinion, and it was rejected by the four dissenters. However, the Second Circuit, at least in dictum, has treated a commercial exception as firmly established. *Hunt* v. *Mobil Oil Co.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed. 2d 477 (1977). *See* Rationalizing the Federal Act of State Doctrine and Evolving Judicial Exceptions, 46 Fordham L.Rev. 295 (1977).

Situations have arisen in which the Supreme Court has found the involvement of a foreign state to be too insignificant to invoke the act of state doctrine. For instance, the instigation of foreign governmental involvement does not mechanically protect conduct otherwise illegal in this country from scrutiny by the American courts. In *United States* v. *Sisal Sales Corp.*, 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042 (1926), a conspiracy which affected United States commerce was held not to be immune from judicial review of Sherman Act claims even though its success was due in part to procurement of discriminatory foreign legislation. The Court distinguished an earlier antitrust case, *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909), in which the act of state doctrine was held to bar adjudication of claims that defendants had influenced Costa Rica to seize plaintiff's property. *American Banana* also held that the Sherman Act could not be applied against conspiracies occurring outside this country. That latter rule of law has been repudiated. Sherman Act jurisdiction now depends upon a showing of anticompetitive effects within the United States. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); *United States* v. *Sisal Sales Corp.*, *supra*, 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 1042; *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

The conspiracy in American Banana took place outside the United States and resulted in Costa Rica's seizure of plaintiff's property there. The seizure was valid in costa [*sic*] Rica and the Court held that its validity could not be challenged in American courts. The *Sisal* conspiracy, by comparison, allegedly destroyed plaintiff's sisal exportation business, not by government expropriation, but by the American corporate defendants' takeover aided by foreign legislation. The *Sisal* Court was not interested in the validity of the legislation but was concerned with

redressing the anticompetitive effects on American commerce caused by the conspiracy.

Similarly, a stage fortuitously set by existing foreign legislation cannot automatically be invoked to shield conspiracies to restrain United States trade. In *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), defendants were charged with conspiring to monopolize the American vanadium industry by currying the favor of a private Canadian corporation designated as exclusive purchasing agent of vanadium by the Canadian government. Drawing from the authority of *Sisal*, the Court rejected the defense that the Canadian law permitted discriminatory purchasing by the authority having power to designate purchasing agents. It was enough that plaintiff claimed that the loss of its business was caused by defendants' actions. The Court was careful to note that the Canadian government itself was not a defendant in the action and that the validity of its legislation was not in issue.

The participation of the Indonesian government in the context of the present analysis cannot prevent Industrial Investment from having its claims adjudicated by the district court. There are no special political factors which outbalance this country's legitimate interest in regulating anticompetitive activity both here and abroad.[10] As in *Sisal* and *Continental Ore*, the complaint charges parties subject to the court's jurisdiction with conduct occurring within this country and elsewhere which violates

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[10] In cases dealing with the enforcement of antitrust laws in the face of state action, we note that the approach of the courts has been to weigh the relative interests of the state and federal governments to determine whether the anticompetitive harm of the activity outweighs the benefits of state regulation. *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed. 2d 1141 (1976); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed. 2d 572 (1975); *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

United States law. To determine whether there has been a violation of American antitrust law it is not necessary to resolve the propriety of Indonesia's failure to issue a cutting license. To protect American antitrust policies, an American court need not embark on an adjudication of the validity of that government's behavior. The Ninth Circuit recently stated:

> The touchstone of *Sabbatino* — the potential for interference with our foreign relations — is the crucial element in determining whether deference should be accorded in any given case. We wish to avoid "passing on the validity" of foreign acts. *Sabbatino*, 376 U.S. at 423, 84 S.Ct. 923. Similarly, we do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action. On the other hand, repeating the terms of *Sabbatino*, *id.* at 428, 84 S.Ct. at 940, "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."

*Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 607 (9th Cir. 1976).

The government of Indonesia is not a named co-conspirator here. Its right to withhold a cutting license is not questioned. This is the major factor distinguishing this case from right-to-ownership cases such as *American Banana* and *Sabbatino*. For instance, in *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (D.C. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), the plaintiffs, holders of a Middle East oil concession from one of the Trucial States, charged the defendants with inducing an adjacent sheikdom in the Persian Gulf, Sharjah, to grant them a conflicting concession covering the same area. The court invoked the act of state doctrine to avoid having to adjudicate which of the two competing sheikdoms had superior authority to grant the concession. It was found that, to establish their claim as pleaded, plaintiffs had to prove that Sharja's [*sic*] concession was fraudulently issued. Passing upon such foreign governmental acts was considered more appropriate for the

executive branch in its handling of foreign relations. By comparison, resolution of the charges made by Industrial Investment does not require a determination of plaintiffs' right to receive a cutting license from the Indonesian government. Unlike *Occidental* where plaintiffs' asserted claim arose through rights granted by a foreign government, Industrial Investment's interest in its business venture with Telaga Mas may be protected from disruptive conduct of competitors by United States antitrust laws.

The only connection which the government of Indonesia has with this action is through application of its Foreign Investment Act, the validity of which is not questioned. The challenge is that a commercial endeavor failed by virtue of external disruptive forces acting on the contractual relationship between private citizens. We need not decide whether, had Telaga Mas not refused to cooperate, the license would have issued as a certainty. It is enough that plaintiffs have offered proof to show that defendants conspired to cause its potential to exploit the Borneo concession to die aborning. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *H & B Equipment Co., Inc.* v. *International Harvester*, 577 F.2d 239 (5th Cir. 1978). *Heatransfer Corp.* v. *Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978). Whether the Indonesian government would have issued a cutting license is relevant only to the value of the destroyed joint venture, not to liability for its destruction.

But the Mitsui defendants argue (and the district court agreed) that the damage complained of stems directly from the denial of the government concession to cut timber. In order to establish therefore that defendants' behavior caused the injury, it would be necessary for the court to investigate the Director of Forestry's motivation in canceling the agreement. This they say

amounts to a prohibited inquiry into the validity of governmental activity. However, plaintiffs' complaint does not limit their allegation of injury from the antitrust cause of action to the inability to harvest Indonesian timber. They assert: "The wrongful acts of Defendants and their co-conspirators have deprived it of its contract and concession rights, of its ability to enter and compete in the market, and of the profits it would have derived from such operations." They insist here that even before it was known whether a license would issue, these rights had a substantial value which they could have proven. Plaintiffs are entitled to recover damages for injury to these "business or property" interests if they are caused by antitrust violations. 15 U.S.C.A. § 15. All the injuries contended for may potentially satisfy that description. *North Texas Producers Association* v. *Young*, 308 F.2d 235 (1962), *cert. denied*, 372 U.S. 929, 83 S.Ct. 874, 9 L.Ed.2d 733 (1963). *See Hunt* v. *Mobil Oil Corp.*, 410 F. Supp. 10 (S.D.N.Y. 1976), *rev'd on other grounds*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977).

The authority asserted to support Mitsui's position is *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984, 98 S.Ct. 608, 54 L.Ed.2d 477 (1977), and *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D.Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972). Both cases involved expropriation by a foreign state of plaintiffs' properties. This distinction alone is of major significance. The *Hunt* court itself, refusing to apply the precedent of *Sisal*, stated:

> [Sisal] considered the assistance of the sovereign through the mechanism of favorable legislation engineered by the defendants to be of considerably less moment that the expropriation by the state of the plaintiffs' properties in [*American Banana*].

550 F.2d at 75. Furthermore, separation of powers consideration in *Hunt* strongly counselled against the court's interference.[11] Despite these distinctions, the *Hunt* opinion broadly states that in order to prove damages an antitrust plaintiff must show that *but for* the conspiracy the foreign government would not have acted as it did. This, the court continues, requires an inquiry into the motivation of the foreign state and "that inevitably involves its validity." 550 F.2d at 77.

This broad language in *Hunt* has been criticized for encouraging use of the act of state doctrine as a shield by private conspirators who are able to include some foreign governmental act

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[11] The complaint by Hunt, an independent oil producer holding oil concessions in Libya, charged defendants, the seven major oil companies, with fraudulently inducing Hunt to be uncooperative in pricing negotiations with Libya. Hunt did so, and Libya retaliated by nationalizing Hunt's properties thus totally eliminating Hunt from the field of competition. Libya was incensed. It loudly proclaimed its purpose to give the United States "a big hard blow in the Arab area on its cold, insolent fact." 550 F.2d at 73 *quoting* Statement of the State Department, Hearings before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, 93d Cong., 2d Sess., pt. 6, at 316-17 (1974). In response, the United States government wrote the Libyan government and characterized the expropriation as "political reprisal against the United States Government and coercion against the economic interests of certain other U.S. nationals in Libya." 550 F.2d at 73, *quoting*, A. Rovine, Digest of United States Practice in International Law 1973 at 335. The Second Circuit refused to upset the executive's identification of Libya's motivation by another inquiry which "could only be fissiparous, hindering or embarrassing the conduct of foreign relations which is the very reason underlying the policy of judicial abstention expressed in the doctrine in issue." 550 F.2d at 77-78.

The court found that, even if the Department of State had not openly expressed its position, the political and diplomatic dimensions were too burdensome for resolution by the judiciary: "The action taken here is obviously only an isolated act in a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants." 550 F.2d 78. No such "implications and complications" hinder a resolution of Industrial Investment's antitrust claims here.

in their anticompetitive scheme.[12] We do not agree that, in establishing a causal relation between the private violations alleged and the injuries suffered, the plaintiffs must prove that defendant's [*sic*] acts were the sole cause of the injury. Of course, plaintiffs must show a causal relationship between defendants' anticompetitive actions and the harm suffered. *Radiant Burners, Inc.* v. *Peoples Gas*, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961). However, inquiry beyond the fact of some damage flowing from the unlawful conspiracy relates only to the amount and not the fact of damage. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1571, 23 L.Ed.2d 129 (1969); *Story Parchment Co.* v. *Paterson Parchment Paper Co., supra*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544; *E & B* [*sic*] *Equipment Co., Inc.* v. *International Harvester, supra*, 577 F.2d 239; *Heatransfer* v. *Volkswagenwerk, A.G., supra* 553 F.2d 964. Furthermore, we disagree that motivation and validity are equally protected by the act of state rubric. *See, e.g., Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra*, 370 U.S. 705, 82 S.Ct. 1404; *Timberlane Lumber Co.* v. *Bank of America, supra*, 549 F.2d 597. Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action. Industrial Investment must only question that government's motivation to the extent of measuring its damage. No ethical standard is set by which the propriety of its decision is tested. Surely the limited nature and effect of determining the proporational cause of plaintiffs' damage allocable to defendants' conduct does not trigger the type of special political considerations protected by the act of state doctrine.

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[12] Note, Sherman Act Jurisdiction and the Acts of Foreign Sovereigns, 77 Colum.L.Rev. 1247 (1977); Note, the Act of State Doctrine: Anti-Trust Conspiracies to Induce Foreign Sovereign Acts, 10 Int'l Law and Politics 495 (1978).

The objective sought by passage of the Sherman Act is preservation and maintenance of effective competition in this country. *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). To provide an act of state shield to business entities whose activities happen to reach beyond United States soil would thwart this objective. The courts are an important forum for protection against competitive restraints. Although the act of state doctrine is a vital rule of judicial abstention in the field of foreign relations, it does not apply in this case.

REVERSED and REMANDED.

JONES, Circuit Judge, dissenting:

The district court's decision as succinctly and accurately stated in the majority opinion, is "that the damage complained of stems directly from the denial of the government concession to cut timber." I am like minded. If the statement be true then the Act of State doctrine requires a dismissal of the action.

## APPENDIX C

## JUDGMENT

**Of the**
**United States Court of Appeals**
**For the Fifth Circuit**
**April 25, 1979**

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UNITED STATES DISTRICT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 78-1775

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D. C. DOCKET NO. CA-75-H-1041
INDUSTRIAL INVESTMENT DEVELOPMENT
CORPORATION, ET AL.,

*Plaintiffs-Appellants,*

v.

MITSUI & CO., LTD. AND
MITSUI & CO., (U.S.A.),

*Defendants-Appellees.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

Before JONES, CLARK and INGRAHAM, Circuit Judges

**JUDGMENT**

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

April 25, 1979

Jones, Circuit Judge, dissenting.

ISSUED AS MANDATE:

## APPENDIX D

**Notice of Order Denying Petition for Rehearing and Rehearing En Banc**

**July 6, 1979**

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UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

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Office of the Clerk

JULY 6, 1979

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Edward W. Wadsworth, Clerk
Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

No. 78-1775 — INDUSTRIAL INVESTMENT DEVELOPMENT CORP., ET AL. VS. MITSUI & CO., LTD. AND MITSUI & CO., (U.S.A.)

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.*

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* Judge JONES dissents from the refusal of the panel to grant rehearing, for the reasons shown in his prior dissent.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH, Clerk
By /s/ JULIE HARRISON
Deputy Clerk

cc: Mr. Fitzhugh H. Pannill, Jr.
Mr. B. J. Bradshaw
Mr. R. Hayden Burns

## APPENDIX E

**In The**

**United States District Court**

**For the Southern District of Texas**

**Houston Division**

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INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, INDONESIA INDUSTRIAL INVESTMENT CORPORATION, LTD., and FOREST PRODUCTS CORPORATION, INC.,

*Plaintiffs*

v.

MITSUI & CO., LTD., MITSUI & CO. (U.S.A.), INC., and P. T. TELEGA MAS KALIMANTAN CO.,

*Defendants*

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**ORDER**

CIVIL ACTION NO. 75-H-1041

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APRIL 6, 1981

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ORDER:

The judgment of dismissal entered in this action was reversed by the United States Court of Appeals for the Fifth Circuit, and the cause remanded. *Industrial Investment Development Corp.* v. *Mitsui & Co., Ltd.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980). The remaining four grounds on which Defendants rest their motion for summary judgment are: (1) Plaintiffs lack standing since they have incurred only derivative damages as shareholders; (2) the subject matter of this action is

beyond the extraterritorial reach of American antitrust laws; (3) Plaintiffs are not within the "target area" of antitrust law protection; and (4) forum non conveniens.

The fact that a complaint contains federal antitrust claims does not bar summary judgment where appropriate. *Alladin Oil Co.* v. *Texaco, Inc.*, 603 F.2d 1107, 1111 (5th Cir. 1979). Based upon a consideration of the entire record, the Court is of the opinion that there is no genuine issue of material fact, *Aviation Specialties, Inc.* v. *United Technologies Corp.*, 568 F.2d 1186, 1188-90 (5th Cir. 1978), and that this action must be dismissed for the reasons stated in grounds (1), (2), (3) and (4). The arguments in Defendants' briefs in support of these grounds are meritorious and the Court finds them to be dispositive.

The Court, in its discretion, *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 726 (1966), declines to exercise pendent jurisdiction over Plaintiffs' claims for misappropriation, conversion, interference with contractual relationships and breach of contract based on Texas and Indonesian law due to lack of a substantial federal claim. The Court is of the opinion that Plaintiffs cannot raise these issues under diversity jurisdiction because complete diversity of citizenship is lacking. *See Ed & Fred, Inc.* v. *Puritan Marine Insurance Underwriters Corp.*, 506 F.2d 757, 758 (5th Cir. 1975); *Lavan Petroleum Co.* v. *Underwriters at Lloyds*, 334 F. Supp. 1069, 1071 (S.D.N.Y. 1971). The Court is also persuaded that Texas courts, applying the contract and tort conflict of laws rules in effect in 1975, would hold that Indonesian and not Texas law governs Plaintiffs' non-federal claims. *See* 12 *Texas Jurisprudence 2d*, Conflict of Laws §§ 9-13 (1960) and cases cited therein.

The "act of state" doctrine against a review by a United States court of the propriety, validity or motives behind the actions of a foreign sovereign has been found inapplicable by the Court of Appeals. This Court is of the opinion that this case is controlled by the distinguishable doctrine elucidated in cases

such as *Parker* v. *Brown*, 317 U.S. 341 (1943), *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1975).

IT IS, THEREFORE,

ORDERED that Defendants' motion for summary judgment is GRANTED.

DONE at Houston, Texas, this 6th day of April, 1981.

/s/ ROSS N. STERLING
UNITED STATES DISTRICT JUDGE

## APPENDIX F

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

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No. 81-2175

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INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.,

*Plaintiffs-Appellants,*

v.

MITSUI & CO., LTD., ET AL.,

*Defendants-Appellees.*

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MARCH 31, 1982

Appeal from the United States District Court for the Southern District of Texas.

Before COLEMAN, REAVLEY, and SAM D. JOHNSON, *Circuit Judges.*

REAVLEY, *Circuit Judge:*

This is an antitrust suit. The district court initially granted the defendants' motion for summary judgment on the single ground that the action was barred by the act of state doctrine. We reversed. 594 F.2d 48 (5th Cir. 1979), *cert. denied,* 445 U.S. 903, 100 S.Ct. 1078, 63 L.Ed.2d 318 (1980). On remand, the district court turned back to the same motion of the defendants and granted summary judgment on the three remaining grounds: (1) that defendants' conduct is beyond the extra-territorial scope of the antitrust laws; (2) that plaintiffs have no standing to sue

under the antitrust laws; and (3) *forum non conveniens*.[1] The court declined to exercise pendent jurisdiction over plaintiffs' nonfederal claims, and dismissed the suit.[2] Defendants were not entitled to summary judgment on any of the grounds they invoked. We again reverse and remand.

## I. Background

The plaintiffs are an American corporation, Industrial Investment Development Corporation ("Industrial Investment"), and its two Hong Kong subsidiaries, Indonesia Industrial Investment Corporation, Ltd. ("Indonesia Industrial") and Forest Products Corporation, Ltd. ("FPC"). The defendants-appellees are a Japanese corporation, Mitsui & Co., Ltd. ("Mitsui-Japan") and its American subsidiary, Mitsui & Co. (U.S.A.), Inc. ("Mitsui-U.S.A."). A third defendant is an Indonesian corporation, P. T. Telaga Mas Kalimantan Company, Ltd. ("Telaga Mas"), which was served but has never appeared in this action.

Plaintiffs claim that the three defendants conspired to keep plaintiffs out of the business of harvesting trees in East Kalimantan (Borneo), Indonesia and exporting logs and lumber from Indonesia to the United States and other countries. Plaintiffs allege that defendants' conspiracy was intended to and did unreasonably restrain and monopolize the foreign commerce of

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[1] The defendants and the court below considered these three to be four grounds for summary judgment, as we also listed them in our prior opinion. *See* 594 F.2d at 49 & n.2 (expressly reserving decision on these grounds). As will be seen, however, we consider two of those grounds under the single issue of standing.

[2] Because we reverse the district court's decision concerning the antitrust claims, once again we do not reach the question whether the district court has diversity jurisdiction over plaintiffs' nonfederal claims under 28 U.S.C. § 1332(a)(3). *See* 594 F.2d at 49 n.3. We also note that our reversal in this case vacates the district court's refusal to exercise pendent jurisdiction over the nonfederal claims. Contrary to the baseless argument made by defendants after the first remand, neither our prior opinion nor this one establishes as "law of the case" that pendent jurisdiction was properly declined.

the United States, in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.[3] Plaintiffs also claim that the two Mitsui defendants are liable for tortious interference with contractual relations. In our prior opinion, we detailed the plaintiffs' allegations concerning the defendants' efforts to deprive plaintiffs of their alleged contractual rights to a timber concession in East Kalimantan. *See* 594 F.2d at 50. We will not repeat those allegations here. We think it useful for the purposes of this appeal, however, to outline the procedural history of this case.

On June 19, 1975, plaintiffs filed their complaint in this action, along with a set of interrogatories and a document request addressed to Mitsui-U.S.A. Response to the interrogatories and document request was made on October 1, 1975. On

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[3] Section 1 of the Sherman Act, as amended, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1(1976). Section 2 of the Sherman Act, as amended, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2(1976).

Plaintiffs also alleged that the conspiracy was intended to and did restrain free competition in and increase the price of articles imported into the United States, in violation of § 73 of the Wilson Tariff Act, 15 U.S.C. § 8. Since neither party has discussed this claim either below or on appeal, we express no opinion on it.

July 6, 1976, plaintiffs served a set of interrogatories and a document request on Mitsui-Japan, which did not respond until April 27, 1977. One month later, defendants served their motion for dismissal and summary judgment on grounds of standing, subject matter jurisdiction, and *forum non conveniens*. After replying to defendants' voluminous motion papers on October 11, 1977, plaintiffs attempted to continue discovery. On November 4, 1977, plaintiffs served notice that they would take the deposition of Mitsui-Japan on December 15 in Houston, Texas. After securing a postponement, Mitsui-Japan moved for a protective order on January 6, 1978, asking the court to stay all discovery on the ground that it had filed a dispositive motion and that "the questions raised in said motion are questions of law rather than questions of fact and involve, primarily, the insufficiency of plaintiffs' legal theories under the facts as alleged by them."[4] Responding to this motion, plaintiffs argued that it was "especially inappropriate" to stay the deposition of Mitsui-Japan while a summary judgment motion was pending, since plaintiffs were entitled to discover evidence establishing the existence of genuine issues of material fact.

The district court did not rule on the stay of Mitsui-Japan's deposition; it granted summary judgment on the act of state ground on February 28, 1978. This court's mandate reversing that judgment was not issued until September 4, 1979. When plaintiffs attempted to resume discovery by serving a notice of deposition of Mitsui-U.S.A. on September 7, 1979, defendants filed another motion to stay all discovery pending the court's resolution of the remaining grounds in its motion, again averring that "the issues raised are questions of law rather than questions

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[4] Mitsui-Japan also argued that its deposition should be taken in Tokyo "or in the home cities" of the witnesses it designated as its representatives and that plaintiffs should be required to deposit $25,000 with the court to cover the costs of the deposition. We express no view as to how the district court should have resolved these contentions.

of fact and involve, primarily, the insufficiency of plaintiffs' legal theories under the facts as alleged by them." After this motion and two others were denied in November and December of 1979,[5] Mitsui-U.S.A. produced employees for deposition in December. Then, on March 7, 1980, plaintiffs filed a motion to compel discovery, asking the court to resolve the issues concerning the deposition of Mitsui-Japan and also contending that Mitsui-U.S.A. had failed to present for deposition representatives with knowledge of the matters involved in this litigation.

Thirteen months later, without resolving any of the outstanding discovery issues, the court again granted summary judgment against plaintiffs. The court explained only that it found "[t]he arguments in Defendants' briefs" to be "meritorious" and "dispositive."[6] Although the action had been pending for almost six

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[5] After the motion for a stay of all discovery was denied, defendants moved for a protective order which would exclude from Mitsui-U.S.A.'s deposition most of the matters listed in plaintiffs' notice of deposition solely on the ground that the matters were not "reasonably calculated to lead to the discovery of admissible evidence," Fed. R. Civ. P. 26(b)(1). Defendants offered no explanation why the matters listed were not relevant, and the matters were, at face value, plainly relevant. The district court denied the motion on December 7. Shortly before the deposition was to commence, defendants filed another motion, this time in the United States Supreme Court, asking for a stay of the deposition pending the Court's disposition of defendants' pending petition for a writ of certiorari. In their motion papers, defendants alleged that the witnesses for the deposition would have to travel from great distances; yet, the witnesses Mitsui-U.S.A. actually produced were located in Houston. The Supreme Court denied defendants' motion after the deposition had begun.

[6] In addition, the court granted summary judgment on a ground never advanced in defendants' briefs. Noting our prior decision that this action was not barred by the act of state doctrine, the district court held, without elaboration, that the action was barred by the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), and the political free speech doctrine of *Eastern R. R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38, 81 S.Ct. 523, 529-30, 5 L. Ed. 2d 464 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-70, 85 S.Ct. 1585, 1593, 14 L. Ed. 2d 626 (1965). This holding was clearly

years, plaintiffs had not been allowed to depose one of the defendants, and claimed that the deposition of the other was insufficient. Almost four years had been consumed by defendants' motion for dismissal and summary judgment and their attendant efforts to resist discovery on the ground that resolution of the motion could render further discovery unnecessary.

## II. The Extraterritorial Scope of the Sherman Act

### A. Effect on United States Commerce

A restraint that directly or substantially affects the flow of commerce into or out of the United States is within the scope of the Sherman Act. *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704, 82 S.Ct. 1404, 1413, 8 L. Ed. 2d 777 (1962); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir. 1945) (*"Alcoa"*); 1 J. von Kalinowski, Antitrust Laws and Trade Regulation § 5.02[2][c] (1980); L. Sullivan, Antitrust 714-16 (1977). A review of the summary judgment submissions and evidence convinces us that defendants have not demonstrated that there is no genuine issue concerning the existence of a direct or substantial effect on United States foreign commerce. *See* Fed. R. Civ. P. 56(c); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 157-61, 90 S.Ct. 1598, 1608-10, 16 L. Ed. 2d 142 (1970) (burden on movant).

In their briefs prior to the first appeal, defendants' attack on the existence of an effect on United States commerce was only

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in error. We express no opinion, however, on whether the *Noerr-Pennington* doctrine would protect a person's petitions to a foreign government to take certain action. This issue was not briefed here or below. We do note that defendants' efforts to influence the actions of Telaga Mas are not protected by the *Noerr-Pennington* doctrine, just as they were not protected by the act of state doctrine, simply because they later resulted in government action. Defendants have pointed to no acts of petitioning the government in the *Noerr-Pennington* sense. *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-08, 82 S.Ct. 1404, 1415, 8 L. Ed. 2d 777 (1962) (explaining *Noerr*).

an attack on plaintiffs' pleadings. Defendants placed their own characterization on the complaint and declared that the case involved only the tree-cutting business in Indonesia; thus, they concluded, their conduct had no effect on United States commerce. Plaintiffs had alleged, however, that Mitsui-U.S.A., an American corporation which imports a sizeable amount of lumber or lumber products into the United States, had conspired to keep them out of the business of harvesting trees and exporting logs and lumber from Indonesia to the United States. There was ample evidence in the record to show that Mitsui-U.S.A. had appropriated much of the business that plaintiffs claim they would have derived from the forestry concession: Mitsui-U.S.A. was purchasing the bulk of the logs from the concession and selling them for export to Mitsui-Japan at a substantial profit.

The competition between two American importers to obtain a source of supply on foreign territory affects the foreign commerce of the United States. *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 604-05, 615 (9th Cir. 1976); *see Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804, 811-17 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093, 89 S.Ct. 872, 21 L.Ed. 2d 784 (1969); *cf. Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 113 n. 8, 89 S.Ct. 1562, 1571 n. 8, 23 L.Ed. 2d 129 (1969) (American corporation's participation in foreign patent pools); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 71 S.Ct. 971, 95 L. Ed. 1199 (1951) (division of foreign markets by American corporation and its foreign affiliates). Mitsui-Japan was allegedly a co-conspirator in this attempt to restrain competition between two American competitors. Thus, defendants' attack on the pleadings did not make it "appear[ ] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L. Ed. 2d 80 (1957) (motion to dismiss for failure to state a claim), *quoted in McLain* v. *Real Estate Board*, 444 U.S. 232,

245, 100 S. Ct. 502, 511, 62 L. Ed. 2d 441 (1980) (challenge to "jurisdictional element" of a Sherman Act claim).

After we reversed the district court's first grant of summary judgment, the defendants shifted to a factual attack by arguing that the single, undisputed fact that Mitsui-Japan exported all of the lumber, purchased from Mitsui-U.S.A. in Indonesia, to Japan demonstrated that there was no genuine issue concerning an effect on United States commerce. Mitsui-Japan argued — and this is the argument it advances most strenuously in this court — that when a Japanese business competes with an American business in Indonesia and exports the fruits of that competition solely to Japan, any effect on United States commerce is purely incidental, indirect, and unintentional. Even if defendants' argument is correct — an issue we do not reach — it ignores the allegations in this case. Here, an American corporation with an interest in protection of its import business has allegedly conspired to eliminate a potential American competitor in both the business of purchasing logs in Indonesia and the business of importing lumber and lumber products into the United States.

Defendants' showing did not demonstrate that there was no genuine fact issue for the simple reason that defendants' showing was not responsive to plaintiffs' allegations. That one co-conspirator — Mitsui-Japan — followed a course of business action that, in isolation, might not be considered a violation of the United States antitrust laws does not demonstrate either that the effect of the conspiracy as between the (?) American competitors is not an effect on United States commerce or that the intent of the conspiracy was not to restrain competition between the American competitors. "[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles [and] the proof is largely in the hands of the alleged conspirators . . . ." *Poller* v. *CBS, Inc.*, 368 U.S. 464,

473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962). Summary judgment is even less appropriate here, where there is ample evidence of a conspiracy to keep plaintiffs from becoming a competitor, and plaintiffs have not had an opportunity to depose one of the conspirators on the effect and intent of their efforts.

**B. Comity and International Conflicts**

A district court should not apply the antitrust laws to foreign conduct of foreign actors if such application would violate principles of comity, conflicts of law, or international law. *See Alcoa*, 148 F.2d at 443; 1 J. von Kalinowski, *supra*, §§ 5.03 & 5.04. The act of state doctrine, which we rejected as a defense to this suit in the prior appeal, is an example of a principle of comity which, when applicable, prevents the court from entertaining a claim. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 416-27, 84 S.Ct. 923, 934-40, 11 L.Ed.2d 804 (1964). Like the act of state doctrine, the question whether any other principle of comity, or of international law, or any conflicts of law analysis prevents the district court from entertaining the suit is a question of law which is fully reviewable by this court on appeal.[7]

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[7] Several recent court of appeals decisions have proposed a conflict of laws analysis for determining whether the district court should entertain an antitrust claim involving extraterritorial conduct. *See Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d at 613-15; *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1253-56 (7th Cir. 1980). We commend their analysis, but we note that there has been some debate concerning the nature of the inquiry established. In a concurring opinion in *Mannington Mills*, Judge Adams argued that the test established in Timberlane, the leading case in this line, is a test of subject matter jurisdiction. *Mannington Mills*, 595, F.2d at 1299-1301. *See generally Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1171-77 (E.D. Pa. 1980). Like the Third Circuit majority and the Seventh Circuit, however, we do not read the *Timberlane* balancing test as a test of subject matter jurisdiction. *Compare Timberlane*, 549 F.2d at 602 (recognizing the rule that case should not be dismissed for lack of subject matter jurisdiction unless allegations are

Defendants invoke the conflicts of law analysis established in *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d at 613-15. But their attempt to satisfy the *Timberlane* test is a series of mere assertions, unsupported by the pleadings or by summary judgment evidence. For example, despite defendants' slightly familiar arguments, they have not demonstrated any "conflict with [the] law or policy" of the Indonesian government or any potential difficulty in enforcing a district court decree. *Timberlane*, 549 F.2d at 614. Neither the Indonesian court's nullification of plaintiffs' joint venture agreement with Telaga Mas nor the Indonesian government's action in cancelling its approval of plaintiffs' joint venture — both described in our prior opinion, *see* 594 F.2d at 50 — has been shown to have been an approval of defendants' efforts to destroy the joint venture agreement or a determination that plaintiffs were not entitled to enforce their contractual rights or to do business in Indonesia. To the contrary, a second Indonesian court held that plaintiffs were not bound by the nullification order, and the Indonesian government invited plaintiffs and Telaga Mas to make a new agreement. *See id.* Moreover, the evidence in the present record more strongly supports the plaintiffs' contention that prosecution

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frivolous), *with id.* at 615 (concluding that plaintiffs' allegations of effect were sufficient to bring the case "within the jurisdiction of the federal courts," but remanding for further consideration of whether that jurisdiction should be exercised). Perhaps the confusion is a result of the use of the term "jurisdiction," which can have a number of meanings. But the meaning of "subject matter jurisdiction" in federal law is established by *Bell* v. *Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). *See Green* v. *Ferrell*, 664 F.2d 1292, 1294-95 (5th Cir. 1982). The wide-ranging inquiry suggested by *Timberlane* and its progeny does not fit within *Bell's* approach to subject matter jurisdiction. We also disagree with the suggestion *In re Uranium Antitrust Litigation*, 617 F.2d at 1255, that the question whether to entertain the suit is discretionary with the trial judge. A decision not to apply the antitrust laws must be based on solid legal ground; the question is one of interpreting the scope that Congress intended to give the antitrust laws. *Alcoa*, 148 F.2d at 433. It is a question of law that is fully reviewable on appeal.

of this suit is fully consistent with the laws and policy of Indonesia because defendants' actions may have been torts or statutory violations under Indonesian law.

Defendants have demonstrated no basis for declining to entertain this suit. The grant of summary judgment on this ground was error.

## III. Standing

In their original motion papers, defendants argued that plaintiffs did not have antitrust standing because they were not within the "target area" of the alleged anti-competitive acts and because any injury they suffered was merely derivative injury suffered as shareholders of other corporations. After remand, and on this appeal, defendants have argued that plaintiffs lack standing because they have not alleged "*antitrust* injury," invoking the italicized doctrine of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697. 50 L.Ed.2d 701 (1977).* We deal with these contentions in turn.

### A. Target Area

Section 4 of the Clayton Act grants a cause of action to "[a]ny person . . . injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. It does not list the requirements of standing. *See* Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits*, 71 Colum. L. Rev. 1, 24 (1971). Rather, standing is a judicially created doctrine designed to foreclose recovery to some plaintiffs who, although within the literal terms of § 4, have suffered injuries that are too "remote" or "indirect." *See Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975). Simply because an element of a private antitrust claim can be traced to the language of § 4 does not, as defendants seem to believe, make that element a component of "standing." The

* We note that Brunswick was decided four months before defendants first moved for dismissal and summary judgment.

standing inquiry involves neither "the violation issue" nor "the damages issue." *Yoder Bros.* v. *California-Florida Plant Corp.*, 537 F.2d 1347, 1359-60 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977).

What standing does involve is the application of this circuit's test for standing, the "target area" test:

> To attain standing a person (whether corporation or individual) must be one against whom the conspiracy is aimed. Or, put in plutonomic terms, the complainant must show that he is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry.

*Jeffrey*, 518 F.2d at 1131. Standing "is a preliminary [matter] to be answered *only* from an examination of the allegations of the complaint." *Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F.2d 539, 547 (5th Cir. 1980) (emphasis added), *cert. denied*, ..... U.S. ....., 102 S.Ct. 427, 70 L.Ed.2d 236 (1981); *accord*, *Yodor Bros.*, 537 F.2d at 1359[9].

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[9] Our writing has not always been consistent with the principle that standing is a matter to be determined only from the pleadings. In *Associated Radio Serv. Co.* v. *Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980), *cert. dened*, 450 U. S. 1030, 101 S.Ct. 1740, 68 L.Ed. 2d 226 (1981), we were reviewing a jury verdict in favor of plaintiffs, two affiliated corporations. We upheld the trial court's grant of judgment n. o. v. against one of the plaintiffs because "there was *no* evidence" that defendants had caused an injury to competition in the separate market in which that plaintiff operated. *Id.* at 1362. While we termed this a determination of standing, it was, properly speaking, a determination that plaintiffs failed to prove allegations that would have given them standing — i.e., they failed to prove that they had suffered an injury within the target area of the illegal restraint. The question whether plaintiffs have in fact suffered such injury is not properly termed a question of standing. *See Yoder Bros.*, 537 F.2d at 1359-60. As will be seen, even if we construe defendants' standing arguments as a request for summary judgment on the fact of injury, defendants were not entitled to summary judgment on this ground.

Plaintiffs' allegations are clearly sufficient to give them standing. All three plaintiffs allege that they were to be direct participants in the harvesting and exporting of logs and lumber products from Indonesia, and the importing and marketing of such materials in several markets, primarily the United States. They allege that defendants destroyed plaintiff FPC's rights in the forestry concession in order to keep them out of harvesting, exporting, and marketing, businesses in which both defendants are allegedly engaged. Plaintiffs have also made detailed allegations concerning their intentions and preparations to enter these proposed businesses. *See Martin* v. *Phillips Petroleum Co.*, 365 F.2d 629, 633 (5th Cir.), *cert. denied*, 385 U.S. 991, 87 S.Ct. 600, 17 L.Ed.2d 451 (1966).

Thus, plaintiffs have alleged that they were attempting to enter "that sector of the economy . . . endangered by a breakdown of competitive conditions;" indeed, they were the very persons "against whom the conspiracy [was] aimed." *Jeffrey*, 518 F.2d at 1131.

**B. Derivative Injury**

Defendants have constructed a "derivative injury" argument which is in part not a "standing" argument at all but a request for summary judgment on the factual issue of injury. First, they examine the relationship between the three corporate plaintiffs: plaintiff FPC, a Hong Kong corporation, was wholly owned by plaintiff Indonesia Industrial, another Hong Kong corporation; all of Indonesia Industrial's stock was owned by two other Hong Kong companies which held the stock in trust for the American parent, plaintiff Industrial Investment. Next, defendants point out that the forestry concession was to be operated by a never-formed Indonesian corporation to be owned by FPC and Telaga Mas. Beginning their legal argument, defendants declare that the only possible restraint on commerce caused or intended by their destruction of the joint venture between FPC and Telaga Mas was a restraint on the tree-harvesting business in Indonesia.

Invoking the rule that a corporate shareholder has no standing to sue for antitrust injury to the corporation, *see Martens* v. *Barrett*, 245 F.2d 844, 846 (5th Cir. 1957), defendants argue that FPC's only injury was as a shareholder of the never-formed Indonesian corporation; that Indonesia Industrial's only injury was as a shareholder of FPC; and that Industrial Investment's only injury was as a shareholder of its Hong Kong subsidiaries. Finally, going beyond the pleadings, defendants question Indonesia Industrial's and Industrial Investment's claims that they would be directly involved in the export and marketing of logs and lumber products.

We reject defendants' argument for several reasons. First, defendants' contention that the only restraint was on the Indonesian tree-harvesting business is simply their own revision of plaintiffs' pleadings. Plaintiffs have alleged that defendants were attempting to restrain competition in the harvesting, acquisition, export and marketing of logs from Indonesia, business activities in which the defendants are allegedly involved. Defendants cannot determine the intent and effect of the alleged conspiracy by *ipse dixit*.

Second, defendants read *Martens* v. *Barrett* too broadly when they contend that it deprives FPC of standing to seek damages for defendants' efforts to keep it out of the harvesting business. In *Martens* v. *Barrett*, two plaintiffs, the sole shareholders of a corporation that owned and operated a gas station, brought an antitrust action against the station's former distributor. We held that "where the business or property allegedly interfered with by forbidden practices is that being done and carried on by a corporation, it is that corporation alone and not its stockholders . . ., who has a right of recovery." 245 F.2d at 846.[10] We do not question that holding; it is fully consistent with one of the purposes of the doctrine of antitrust standing: avoiding "the

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[10] *Accord*, *Mendenhall* v. *Fleming Co.*, 504 F.2d 879 (5th Cir. 1974).

problems of double recovery." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264, 92 S.Ct. 885, 892, 31 L.Ed.2d 184 (1972). Had we allowed the shareholders in *Martens* to recover, there would have been no assurance that the corporation would not later have sought damages in its own name. Moreover, there was no justification in *Martens* for not having the corporation bring suit.

The situation is vastly different when defendants' own actions are alleged to have aborted the entity which defendants claim has sole standing to sue. The antitrust standing inquiry is not a search for labels; it is a search for the most direct targets of the anticompetitive acts. *Jeffrey* v. *Southwestern Bell*, 518 F.2d at 1131 (citing *Martens*); *cf. Tugboat,Inc.* v. *Mobile Towing Co.*, 534 F.2d 1172, 1176 (5th Cir. 1976) ("[t]he key question" is whether plaintiffs themselves are within the target area, not whether they are "employees" of a business within the target area). There was no more direct target of defendants' alleged activity than FPC. Since the joint venture corporation was never formed, there is no possibility of double recovery. We hold that FPC has standing to challenge the alleged restraint in the harvesting business.[11]

Third, neither Indonesia Industrial nor Industrial Investment claims damages for injury to the value of its interest in another corporation. Each alleges injury by reason of a restraint on a business activity it claims it was preparing to enter.

Fourth, even if some of the damages from lost business claimed by Indonesia Industrial or Industrial Investment could be viewed as "deriving" from their relationship with FPC, it would not defeat their standing in this case. Each plaintiff alleges that it was plaintiffs' very competition that defendants

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[11] We do not thereby hold or imply that the Indonesian harvesting business is, in itself, within the reach of the antitrust laws. Whether plaintiffs can prove an injury within the extraterritorial scope of the Sherman Act awaits factual development in the trial.

were attempting to exclude. There is evidence in the record that supports these allegations, particularly the allegation that it was the American parent that defendants wanted to keep away from Indonesian timber. When a person is the direct target of an anticompetitive act, he has standing to sue for injury to his business. *See Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 649-50, 89 S.Ct. 1871, 1875, 23 L.Ed.2d 599 (1969);[12] *Hayes* v. *Solomon*, 597 F.2d 958, 981 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078, 100 S.Ct. 1028, 62 L.Ed.2d 761 (1980).[13]

Finally, defendants' contention that plaintiffs would not have been engaged in the business they claim is not a "standing" argument; it is a request for summary judgment on the fact of injury. We simply note that even if defendants had asked for summary judgment on this ground, they would not be entitled to

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[12] In *Perkins*, Perkins sued not only for damages to his two corporations — which had assigned their claims to him, *see* 396 F.2d 809, 813-14 (9th Cir. 1967) — but also for losses "that he as an individual had suffered . . . because the two failing Perkins corporations . . . were unable to pay him agreed brokerage fees . . ., rental on leases . . ., and other indebtedness." 395 U.S. at 649, 89 S.Ct. at 1875. The Supreme Court reversed the court of appeals' ruling that these losses were too indirect to be "injuries" within the meaning of 15 U.S.C. § 15. "It is clear . . . that Perkins was no mere innocent bystander; he was the principal victim of the [antitrust violation]." *Id.* at 649, 89 S.Ct. at 1875.

[13] In the pertinent part of *Hayes* v. *Solomon*, plaintiff rented its movie theatre to defendants, its competitors. Plaintiff alleged that the defendants thereafter had improved the quality of their own theatres while ruining the good will of plaintiff's theatre by exhibiting X-rated films there. 597 F.2d at 971. Defendants argued that since plaintiff was not engaged in the film exhibition business during the damage period, it had no standing, invoking the general rule that a landlord may not sue for injury to the business he rents to. While we acknowledged that this principle was generally sound, we held it inapplicable because plaintiff had alleged "that the conspiracy was aimed at it; it was the alleged bull's-eye of the target. This alleged conspiracy was aimed at [it] as an eventual, inevitable competitor in the motion picture exhibition business . . ." *Id.* at 981. Similarly, there is evidence in this record that defendants' conspiracy was aimed at Industrial Investment, the American parent, as defendants' "eventual, inevitable competitor."

it. The evidence in the record is sufficient to raise a genuine issue of fact.

C. **Antitrust Injury**

Defendants' argument that plaintiffs have no standing because they have not alleged "*antitrust* injury" misconceives both the holding of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489, 97 S.Ct. at 697, and the nature of standing. *Brunswick* is not a standing case. In *Brunswick* the Supreme Court was reviewing a jury's award of damages after a full trial on the merits. Plaintiffs had alleged that defendant, a major manufacturer of bowling equipment, had violated the antimerger provisions of the Clayton Act, 15 U.S.C. § 18, by acquiring and operating the bowling centers that had defaulted in paying for their equipment; plaintiffs' sole proof of damages was the profits they would have made had the defaulting competitors gone out of business. The Supreme Court held this basis of damages "inimical to the purposes" of the antitrust laws; those laws were enacted to protect competition, while plaintiffs claimed injury because competition was not eliminated. *Id.* at 488, 97 S.Ct. at 697. The Court held that injury compensable under 15 U.S.C. § 15 must be

> injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

*Id.* at 489, 97 S.Ct. at 697. The Court did not hold, however, that plaintiffs had no standing; it simply held that plaintiffs had failed to offer proof of "*antitrust* injury."[14] Indeed, the Court indicated that it would have remanded the case for a new trial

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[14] *See Areeda, Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1133 n. 36 (1976) (concluding that plaintiffs in Brunswick were "clearly" within the "target area," but simply failed to prove the right kind of injury).

had plaintiffs offered any proof of injury related to the anticompetitive effects of defendant's acquisition and operation of the competing bowling centers. *Id.* at 489-90, 97 S.Ct. at 698.

It is analytically unsound, we think, to consider the requirement of antitrust injury an additional component of the standing inquiry. Under traditional standing analysis, the court does not reach the substantive issues in plaintiff's complaint, *see* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3531, at 175-76 (1975); instead, the court assumes *arguendo* that plaintiff has pleaded and could prove a violation of substantive law, and asks only whether plaintiff has alleged a concrete injury and a sufficient causal relationship between the injury and the violation. *See Warth* v. *Seldin*, 422 U.S. 490, 498-502, 95 S.Ct. 2197, 2205-07, 45 L. Ed. 2d 343 (1975). To be sure, the doctrine of antitrust standing requires a closer look at the nature of defendant's alleged conduct and its relation to the alleged injury: the court must identify the affected area of the economy and determine whether the alleged injury occurred within that area. *Yoder Bros.*, 537 F.2d at 1360. A person may suffer a causally related injury and still not have standing because the injury is too far removed from the area of commerce "endangered by a breakdown of competitive conditions." *Jeffrey*, 518 F.2d at 1131. Like traditional standing analysis, however, the antitrust standing inquiry does not permit the court to resolve such substantive issues as whether plaintiff has alleged a violation of law and whether plaintiff has in fact suffered injury. *See Yoder Bros.*, 537 F.2d at 1359-60.

The question whether plaintiff has alleged antitrust injury, by contrast, requires the court to look at the nature of the violation alleged and the injury that resulted and to determine whether that injury "flows from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697. This determination is one of substantive law; indeed, such an inquiry could encompass every substantive issue in the case. To call such

an inquiry a determination of standing not only "invites confusion," Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term — 1977*, 77 Colum. L. Rev. 979, 996 (1977), but it drains the term "standing" of any meaning.[15]

We think that this case illustrates the importance of keeping these doctrines distinct. "Standing" is generally understood as an issue to be resolved by the court which does not require the court to determine the legality of defendant's alleged conduct. In this case the defendants moved for summary judgment only on grounds, such as standing, that apparently would not require the court to determine whether the defendants had violated the Sherman Act. In their original submissions, defendants argued that plaintiffs did not suffer "antitrust damages" because they were not in the "target area" of the alleged violation; after our

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[15] There is dictum in one of our previous cases indicating that "antitrust injury" is a component of "standing." *Donovan Constr. Co.* v. *Florida Tel. Corp.*, 564 F.2d 1191, 1192 (5th Cir. 1977) (per curiam) (affirming district court's finding at trial that defendant did not intend to enter the relevant market), *cert. denied*, 435 U.S. 1007, 98 S.Ct. 1878, 56 L. Ed. 2d 389 (1978). Defendants rely on a similar dictum in *Hardwick* v. *Nu-Way Oil Co.*, 443 F. Supp. 940, 943 (S. D. Tex. 1978), *aff'd*, 589 F.2d 806 (5th Cir.), *cert. denied*, 444 U.S. 836, 100 S.Ct. 70, 62 L. Ed. 2d 46 (1979). In reviewing *Hardwick*, however, we expressed no opinion on the district court's discussion of standing, assuming *arguendo* that plaintiff had antitrust standing. 589 F.2d at 807 n.3. In *Guzik* v. *State Bar of Texas*, 659 F.2d 528 (5th Cir. 1981), we affirmed a grant of summary judgment because the record was "devoid of any evidence" suggesting that defendant State Bar of Texas had engaged in illegal price-fixing. *Id.* at 531. We labeled this conclusion, however, a determination of "standing." See *id.* at 530, 531. While *Guzik* and *Donovan Construction* were both correctly decided, the standing language in *Guzik* and the dictum in *Donovan Construction* are inconsistent with the doctrine of antitrust standing as explained in *Yoder Bros.*, 537 F.2d at 1359-60. We also recognize that two other circuits have held that antitrust injury is a component of standing. *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229, 1234 (6th Cir.), *cert. denied*, .... U.S. ...., 102 S.Ct. 388, 70 L. Ed. 2d 207 (1981); *John Lenore & Co.* v. Olympia Brewing Co., 550 F.2d 495, 498-500 (9th Cir. 1977). But we disagree with their analysis.

first remand, and on this appeal, they have argued that plaintiffs did not suffer "antitrust injury" because they cannot prove a violation.[16] Thus, advancing an umbrella concept of standing, they have attempted to transform the very nature of their motion for summary judgment.

Plaintiffs have standing to bring this suit.

## IV. Forum Non Conveniens

The district court agreed with defendants' contention that Indonesia was a more convenient forum for this Sherman Act suit. This conclusion was error. The common law doctrine of *forum non conveniens* is inapplicable to suits brought under the United States antitrust laws. *United States* v. *National City Lines, Inc.*, 334 U.S. 573, 68 S.Ct. 1169, 92 L. Ed. 1584 (1948).

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[16] Construing defendants' motion as one for summary judgment on the violation issue, we hold that it lacks merit. Defendants argue that plaintiffs cannot prove a violation of the Sherman Act under our decisions in *Northwest Power Prods., Inc.* v. *Omark Indus.*, 576 F.2d 83 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116, 99 S.Ct. 1021, 59 L. Ed. 2d 75 (1979), and *Burdett Sound, Inc.* v. *Altec Corp.*, 515 F.2d 1245 (5th Cir. 1975). These decisions, which both involved a supplier's termination of a distributor, establish that the substitution of one competitor for another by means of unfair competition is not in itself a violation of the antitrust laws. Defendants argue that the allegations and proof in this case establish nothing more. Whether conduct aimed solely at a competitor violates the Sherman Act depends upon the effect it has on competition in the relevant market. *Associated Radio Serv. Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1350-51 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030, 101 S.Ct. 1740, 68 L. Ed. 2d 226 (1981); *see Northwest Power*, 576 F.2d at 89. Plaintiffs alleged that defendants have monopolized the relevant market. Because defendants' original motion papers gave plaintiffs no notice that they would need to produce proof on the issue of violation, it is understandable that plaintiffs did not respond with an affidavit under Fed. R. Civ. P. 56(f) requesting a continuance of the motion pending further discovery to support their allegations of market effect. We will not allow defendants to change their grounds of motion while simultaneously resisting discovery of the facts relevant to their new ground. Summary judgment on the violation issue was improper.

In *National City Lines*, the district court dismissed a case brought under §§ 1 and 2 of the Sherman Act on the ground that another United States district court was a more convenient forum. The Supreme Court reversed, holding that the venue provisions of 15 U.S.C. § 22[17] leave no room for judicial discretion to apply the common law doctrine of *forum non conveniens*. *Id.* at 588, 68 S.Ct. at 1177. Defendants argue that *National City Lines* is distinguishable because it dealt with *forum non conveniens* "in a purely venue-related context." This argument is wrong for several reasons. First, it misstates the facts of *National City Lines*, which involved a dismissal, not a change-of-venue order. *Id.* at 577, 68 S.Ct. at 1172. Second, it misconceives the holding of *National City Lines*, which was that 15 U.S.C. § 22 was a statutory elimination of judicial discretion concerning where the case should be tried. Third, it ignores the reasons behind that holding which apply with even greater force to this case. Those reasons were (1) that Congress had enacted the broad venue provisions of 15 U.S.C. § 22 to leave the choice of forum, within certain bounds, to plaintiffs' convenience, *see id.* at 581-88, 68 S.Ct. at 1174-77; (2) that permitting the application of *forum non conveniens* "inevitably would lengthen litigation already overextended," *id.* at 589, 68 S.Ct. at 1178, a prophecy that has come to pass in this case; and (3) that the application of the doctrine would be difficult in antitrust cases, "in which the violations charged are nationwide or nearly so in scope and effect, and the defendants are numerous companies widely scattered in the location of their places of incorporation, principle offices, and places of carrying on business and participating in the scheme." *Id.* at 591, 68 S.Ct. at 1179. The

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[17] Those provisions, taken from § 12 of the Clayton Act, remain unchanged today: "Any suit . . . under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business . . . ." 15 U.S.C. § 22.

holding and rationale of *National City Lines* apply fully to this case.[18]

Even without the authority of *National City Lines*, we would reach the conclusion that antitrust cases cannot be dismissed on the ground that a foreign country is a more convenient forum. Sections 1 and 2 of the Sherman Act do not by their terms purport to define civil obligations owed by one party to another; they make it felonious to restrain unreasonably or to monopolize the commerce of the United States.[19] The treble damages action created for "private attorneys general" by 4 of the Clayton Act, while "designed primarily as a remedy," *Brunswick*, 429 U.S. at 486, 97 S.Ct. at 696, is designed at least in part to "penaliz[e] wrongdoers and deter[ ] wrongdoing." *Id.* at 485, 97 S.Ct. at 696. Since it is a well-established principle of international law that "[t]he Courts of no country execute the penal laws of another." *The Antelope*, 23 U.S. (10 Wheat.) 66, 123, 6 L. Ed. 268 (1825); *accord*, Restatement (Second) of Conflict of Laws § 89 (1971), we have little doubt that the Indonesian courts would quite properly refuse to entertain plaintiffs' Sherman Act claim. A dismissal for *forum non conveniens*, then, would be the functional equivalent of a decision that defendants' acts are

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[18] Defendants argue that the Supreme Court "effectively nullified" its holding in *National City Lines* by its second decision in that case, *United States* v. *National City Lines*, 337 U.S. 78, 69 S.Ct. 955, 93 L. Ed. 1226 (1949). Shortly after the Court's first decision, Congress, in an unrelated move, enacted 28 U.S.C. § 1404(a), which authorizes the district courts to "transfer any civil action to any other district or division" "[f]or the convenience of parties and witnesses." In *National City Lines II*, the Court, relying on the legislative history and the broad term "any civil action," concluded that the transfer statute applied to antitrust actions. 337 U.S. at 80-84, 69 S.Ct. at 956-58. The Court in no way questioned its earlier holding concerning the effect of 15 U.S.C. § 22 on common law *forum non conveniens*. Since defendants can point to no statute authorizing dismissal of an action on *forum non conveniens grounds*, *National City Lines II* does not help them in any way.

[19] For the text of §§ 1 and 2, see note 3 *supra*.

beyond the reach of the Sherman Act.[20] Defendants cannot use the rules of *forum non conveniens* as a substitute for the rules concerning the extraterritorial application of the Act.

Defendants argue that, even if *forum non conveniens* does not apply to a Sherman Act claim, the district court's dismissal of plaintiffs' nonfederal claim on grounds of *forum non conveniens* was not a clear abuse of discretion under the standards set out in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 511-12, 67 S.Ct. 839, 844, 91 L. Ed. 1055 (1947), and recently applied in *Piper Aircraft Co.* v. *Reyno*, ..... U.S. ....., ., 102 S.Ct. 252, 266, 70 L. Ed. 2d 419 (1981). But once it is concluded that the Sherman Act claim should not have been dismissed, the question is not whether, as an original matter, it would be more convenient to hear the nonfederal claim in Indonesia, but whether it would be more convenient to force the parties to litigate two suits, one on the antitrust claim here, the other on the tort claim in Indonesia. The answer in this case is an obvious one: dismissal of the nonfederal claim would be a clear abuse of discretion. Such a course would simply force the litigants to undergo twice all of the inconveniences posited by defendants.[21]

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[20] After this case was taken under submission, the Supreme Court decided *Piper Aircraft Co.* v. *Reyno*, ..... U.S. ....., 102 S.Ct. 252, 70 L. Ed. 2d 419 (1981), and held that "[t]he possibility of a change of substantive law" does not preclude a dismissal on grounds of *forum non conveniens*. *Id.* at ....., 102 S.Ct. at 261. That holding is not inconsistent with our analysis here. *Reyno* involved the civil obligations owed by one private party to another in a tort case; by contrast, a private antitrust suit is conceived as a part of the scheme of enforcement of statutes enacted to protect United States commerce. *See, e.g., Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 342, 99 S.Ct. 2326, 2333-34, 60 L. Ed. 2d 931 (1979). In *Reyno*, there was no question that the doctrine of *forum non conveniens* was applicable; the only question was "the proper application of the doctrine." ..... U.S. at ....., 102 S.Ct. at 261. In this case, the question is whether the doctrine should apply at all.

[21] 21 Defendants point to problems in translations and access to sources of proof. Since this case involves actors and evidence in Indonesia, Japan, and the United States, these problems will be encountered

To a great extent, the two claims involve the same events, evidence, and witnesses. It would be far more convenient to resolve both claims in one trial.

REVERSED AND REMANDED.

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whether the nonfederal claim is tried here or in Indonesia. Much documentary proof has already been amassed here. Japanese witnesses will simply have to travel to two foreign countries if the case is split between the United States and Indonesia. Defendants also assert that "expert witnesses on Indonesian law reside in Indonesia." We find it hard to believe that there are no experts on Indonesian law in this country.

## APPENDIX G

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

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No. 81-2175

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D.C. Docket No. CA-75-H-1401

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INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, *et al.*,

*Plaintiffs-Appellants,*

v.

MITSUI & CO., LTD., *et al.*,

*Defendants-Appellees.*

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**Appeal from the United States District Court for the Southern District of Texas**

Before COLEMAN, REAVLEY and SAM D. JOHNSON, *Circuit Judges.*

**Judgment**

This cause came on to be heard on the record on appeal from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this case be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay the costs on appeal to be taxed by the Clerk of Court.

MARCH 31, 1982

Issued As Mandate: MAY 24, 1982

## APPENDIX H

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

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No. 81-2175

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INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, *et al.*,

*Plaintiffs-Appellants,*

v.

MITSUI & CO., LTD., *et al.*,

*Defendants-Appellees.*

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**Appeal from the United States District Court for the Southern District of Texas**

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**ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**

(Opinion March 31, 1982, 5 Cir., 198__, ____ F.2d ____).
(May 5, 1982)

Before COLEMAN, REAVLEY AND SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc.

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
THOMAS M. REAVLEY
United States Circuit Judge

## APPENDIX I

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.,

*Plaintiffs-Appellants,*

v.

MITSUI & CO., LTD., ET AL.,

*Defendants-Appellees.*

No. 81-2175.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

MAY 9, 1983

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES.

Before COLEMAN, REAVLEY and JOHNSON, Circuit Judges.

PER CURIAM:

In our prior opinion in this antitrust suit we reversed the summary judgment granted to the defendant. 671 F.2d 876. (5th Cir. 1982). We there addressed the three grounds of defendants' motion for summary judgment which the district court had granted. These were: (1) that defendants' conduct is beyond the extra-territorial scope of the antitrust laws; (2) that plaintiffs have no standing to sue under the antitrust laws; and (3) forum non conveniens. The Supreme Court ..... U.S. ....., 103 S.Ct. 1244, 74 L.Ed.2d ....., has vacated our judgment and remanded the case for further consideration in light of the Court's recent opinion in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, ..... U.S. ....., 103 S.Ct. 897, 74 L.Ed.2d 723 (1983).

The Court in Associated General Contractors upheld judgment of dismissal at the pleading stage because the alleged injury of the plaintiff Union was not the type of injury which the antitrust statute was intended to forestall and compensate. Though the Union had alleged an injury and a violation intended to cause the injury, the allegations failed upon the Court's analysis. The Union was neither a competitor nor a customer of those union contractors alleged to have lost business by the coercion of defendants against contracting parties. The injury was an indirect or derivative loss of union dues. Recovery by the Union could lead to duplicate awards against the defendants or require an excessively complex apportionment of damages.

Because of the Court's analysis of antitrust injury and the necessary causal connection between violation and injury for recovery, our discussion of standing at 671 F.2d 885-890 was faulty. Whether or not the inquiry is termed "antitrust standing," the Court teaches the appropriateness of an initial evaluation of plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them tested by the Court's explication of relevant factors of antitrust redress.

In our *Mitsui* case the evaluation is at an initial stage and rests largely upon the allegations of the plaintiffs' pleading, despite the summary judgment, because discovery has been denied to the plaintiffs. As we wrote in the earlier opinion, defendants mischaracterize the plaintiffs' allegations relative to the injury and violation. 671 F.2d at 883-884.

We have no difficulty in reaffirming our former judgment upon the record before us. These plaintiffs have alleged that the defendants conspired to restrain the competition between American competitors by preventing plaintiffs from obtaining a source of supply of logs for their business of importation of lumber and lumber products into the United States. The plaintiffs complain that economic freedom of commerce coming into the United States has been restricted by defendants. Plaintiffs allege a

direct injury because they say not that they lost a purchase because of competition but that defendants conspired to disrupt their joint venture with Telaga Mas, to prevent their entry into competition with a potential American competitor, and thereby to deprive them of business profits because of the loss of that competitive position and opportunity. By denying their source of supply, defendants are alleged to have deprived plaintiffs of the means for their competition with the defendant in the importation of lumber products into the United States. There is no question of duplicate recovery or complex apportionment of damages in this case. Plaintiffs' allegations and the summary judgment record meet the requirements of *Associated General Contractors*.

The district court's judgment for defendants is REVERSED and the cause is REMANDED.

## APPENDIX J

**In The**
**UNITED STATES COURT OF APPEALS**
**For The Fifth Circuit**

No. 81-2175

U.S. Court of Appeals
FILED
June 13, 1983
Gilbert F. Ganucheau
Clerk

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.,

*Plaintiffs-Appellants,*

VERSUS

MITSUI & CO., LTD., ET AL.,

*Defendants-Appellees.*

**Appeal from the United States District Court for the Southern District of Texas**

**ON SUGGESTION FOR REHEARING EN BANC**

(Opinion 5/9/83, 5 Cir., 1983, ..... F.2d .....).

(June 13, 1983)

Before COLEMAN, REAVLEY AND JOHNSON, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS M. REAVLEY
UNITED STATES CIRCUIT JUDGE

*CLERK'S NOTE:*
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE.

REHG-8
Rev. 3/82

Office-Supreme Court, U.S.
FILED
OCT 18 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-398

MITSUI & CO., LTD., ET AL.,

*Petitioners,*

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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No. 83-398

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MITSUI & CO., LTD., ET AL.,

*Petitioners,*

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION, ET AL.,

*Respondents.*

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents, Industrial Investment Development Corporation, Indonesia Industrial Investment Corporation, Ltd., and Forest Products Corporation, Ltd., file this Brief opposing the Petition for a Writ of Cetiorari filed by Mitsui & Co., Ltd. ("Mitsui-Japan"), and Mitsui & Co. (U.S.A.), Inc. ("Mitsui-USA"). Consistent with their status in the trial court, Petitioners will be referred to herein as "Defendants" and Respondents will be called "Plaintiffs."

### QUESTIONS PRESENTED

**ARE PLAINTIFFS' ALLEGATIONS SUFFICIENT TO RAISE ANTITRUST CLAIMS AND IS THERE SUMMARY JUDGMENT EVIDENCE TO SUPPORT THOSE CLAIMS?**

**DO DIRECT COMPETITORS HAVE STANDING TO RECOVER LOSSES SUFFERED BECAUSE OF THEIR EXCLUSION FROM COMPETITION?**

## STATEMENT

Defendants' lengthy petition for writ of certiorari seeks a review of a decision of the Court of Appeals for the Fifth Circuit entered May 9, 1983. *Industrial Investment Development Corp.* v. *Mitsui & Co., Ltd.*, 704 F.2d 785 (5th Cir. 1983). That decision resulted from an order of this Court which granted Defendants' request for further consideration of antitrust standing by the court of appeals[1] and remanded the case for review in light of this Court's opinion in *Associated General Contractors* v. *California Council of Carpenters*, .... U.S. ...., 74 L. Ed. 2d 723 (1983).[2] The court of appeals reaffirmed its original decision for the express reason that Defendants' factual assertions are not supported by the record. 704 F.2d at 786. Since the same factual arguments have again been advanced in this petition, Plaintiffs must restate the facts of this case in accordance with what the record actually contains.

The court of appeals limited its review on remand to antitrust standing, which is what Defendants had requested in their 1982 petition[3], and which was the only issue involved in *Associated General Contractors*. Nevertheless, much of the current petition is devoted to matters for which no review was requested in 1982 and which petitioners have failed to preserve. In fact, the current petition attempts to raise again the act of state issue, which was decided by the court of appeals in 1979,[4] and as to which this Court denied certiorari in 1980.[5] Of the five points

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[1] Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, p. 12, n. 8, *Mitsui & Co., Ltd.* v. *Industrial Investment Development Corp.*, Cause No. 82-178 ("the 1982 Petition").

[2] 75 L.Ed.2d 475 (1983).

[3] 1982 Petition, p. 12, n. 8.

[4] *Industrial Investment Development Corp.* v. *Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980).

[5] *Mitsui & Co., Ltd.* v. *Industrial Investment Development Corp.*, 445 U.S. 903 (1980).

raised by the petition three are procedurally improper and one is now beyond this Court's jurisdiction. Therefore, Plaintiffs must also restate the pertinent prior proceedings both here and below.

**(i) Prior Proceedings**

This case was filed in 1975, has been twice dismissed, and twice appealed. Both dismissals resulted from a motion to dismiss or for summary judgment filed by the Mitsui Defendants in 1977.[6] The judge before whom this case was then pending first granted the motion on the act of state defense, one of the four defenses advanced,[7] and dismissed the case.[8] The court of appeals held that on the basis of undisputed facts in this case, the act of state doctrine did not apply.[9] Defendants filed a petition for writ of certiorari with this Court, which requested an *amicus curiae* brief from the Solicitor General.[10] The Solicitor General agreed that this was not an act of state case, but urged granting of certiorari to disapprove of the broad language of *Hunt* v. *Mobil Oil Co.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 432 U.S. 904 (1977), upon which Defendants had primarily relied.[11] This Court denied certiorari on February 25, 1980. *Mitsui & Co., Ltd.* v. *Industrial Investment Development Corp.*, 445 U.S. 903 (1980).

For two years after the first summary judgment was reversed, Plaintiffs attempted to complete discovery. In particular, they

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[6] Rec. No. 66.

[7] Defendants' motion included two points on standing, Rec. Nos. 66, 67, neither of which presented the argument now before this Court. *See* 671 F.2d at 884, n. 8, and accompanying text. The Court of Appeals treated these points as one defense, 671 F.2d at 880, n. 1, and apparently Defendants now agree. Petition, p. 4.

[8] Rec. No. 84.

[9] 594 F.2d at 55-56.

[10] Order of November 26, 1979, No. 79-552.

[11] Brief for the United States as *Amicus Curiae*, No. 79-552.

sought to obtain a ruling on Defendants' 1978 motion for protective order so that they could take the deposition of Mitsui-Japan.[12] At an informal conference on these matters, the trial judge announced that he intended again to dismiss the case. He subsequently entered a two-page order which granted the remainder of Defendants' original motion for summary judgment and adopted "the arguments in Defendants' briefs."[13] The trial judge also held that the case was barred by either the *Noerr-Pennington*[14] or *Parker* v. *Brown*[15] doctrines, which Defendants had not urged.[16]

On appeal, Defendants conceded that the *Noerr-Pennington* and *Parker* v. *Brown* doctrines were not issues in the case and had been "disposed of" by the court of appeals' decision on the act of state doctrine.[17] The court of appeals also reversed as to standing, jurisdiction, and *forum non conveniens*, the three grounds advanced by Defendants, and again remanded.[18] The court's decision was based primarily on its rejection of Defendants' interpretation of the allegations and evidence and on the lack of discovery.[19]

Defendants' second petition requested that certiorari be granted on only two points: standing and jurisdiction.[20] As an

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[12] *See* 671 F.2d at 881-83.

[13] Rec. No. 139, p. 2. *See* 671 F.2d at 882.

[14] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 364 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

[15] *Parker* v. *Brown*, 317 U.S. 431 (1943).

[16] Rec. No. 139, p. 2. *See* 671 F.2d at 882, n. 6. The order treated the two doctrines as identical.

[17] Brief of Appellees, p. xxi, No. 82-2175, United States Court of Appeals for the Fifth Circuit.

[18] *Industrial Investment Development Corp.* v. *Mitsui & Co., Ltd.*, 671 F.2d 876 (5th Cir. 1982).

[19] *See, e.g.* 671 F.2d at 881-83, 884, 885, 887, 888.

[20] 1982 Petition, pp. 5-12.

alternative ground of relief, Defendants requested that this Court remand the case to the court of appeals for reconsideration of its holding on antitrust standing in light of recent Supreme Court decisions.[21] That request was granted,[22] and this Court's instructions were followed by the court of appeals, which reconsidered the standing issue in light of *Associated General Contractors*. It once again rejected Defendants' interpretation of the evidence and pleadings and reaffirmed its original decision.[23]

After the third remand to the district court, the new trial judge ordered that discovery and trial preparation be completed and advised counsel that the case would be set for trial as soon as the appellate process was concluded.[24] Defendants have continued to obstruct discovery[25] and have used the maximum time permitted to file their petition.[26] The deposition of Mitsui-Japan, noticed in 1977, has been again postponed at Defendants' insistence.[27] Defendants have still not answered interrogatories seeking market information relevant to the very antitrust issues they argue in this petition.[28]

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[21] 1982 Petition, p. 12.

[22] 75 L.Ed.2d 475 (1983).

[23] 704 F.2d at 786 (1983).

[24] *See* Rec. No. 192.

[25] Since Plaintiffs replied to the last petition for writ of certiorari, Defendants have filed ten more instruments seeking a delay or postponement in this case, which brings the total to twenty-nine thus far. *See* Rec. No. 202, n. 1.

[26] Defendants have actually used somewhat more than the maximum time: copies of the petition were not provided to Plaintiffs until a week after it was filed.

[27] *See* Rec. Nos. 188-91, 201.

[28] After delaying matters for eight months with objections, all of which were overruled, and obtaining one extension, Defendants have still failed to timely file answers. They were due September 22, 1983.

The petition which Defendants have filed purports to request a review of the court of appeals' decision of May 9, 1983. Actually, Defendants ask this Court to set aside a judgment of the court of appeals entered in 1979 and to review three other legal theories which Defendants have failed to preserve. The only question which Defendants have properly presented is antitrust standing, which is the primary focus of this reply.

(ii) **The Allegations and Evidence**

This case does *not* involve competition between two companies for the right to purchase logs from an Indonesian firm and does *not* involve the inducement or instigation of foreign governmental action. Those two propositions are the factual basis for all of the various arguments Defendants have included in their petition.[25] Both propositions are contradicted by the pleadings, are against the great weight of the evidence, and yet are advanced in support of a summary judgment.

This case instead arises out of the efforts of the Plaintiffs to compete with Defendants by entering the business of producing and exporting Indonesian logs and lumber products, and importing such products into the United States.[26] To do so, Plaintiffs entered a joint venture with an Indonesian firm (Telaga Mas)

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[25] *See* Petition, pp. 8, 12, 13, 17, 21.

[26] Complaint, ¶¶ 16, 50, Rec. pp. 389, 402: "Plaintiffs would show that their proposed operation consisted of harvesting and exporting logs and lumber products from Indonesia, and importing such materials into several markets, but that their chief market was the United States. Until prevented by the conspiracy herein alleged, [Plaintiffs] attempted to enter into competition with [Defendants] in the exporting and sale of logs, lumber and wood products from Indonesia to the United States; and in the importing and sale of processed goods and machinery from the United States into Indonesia." *Id.* at ¶ 50. *See* 671 F.2d at 881.

which had been granted a concession by the Indonesian government.[31] That concession was unique in that it contained substantial quantities of highly valuable agathis timber.[32] Plaintiffs and Telaga Mas agreed to divide the concession area into two parts. The southern portion was to be operated independently by Telaga Mas, and the northern three-quarters of the concession was to be operated by a joint venture between Telaga Mas and Plaintiffs.[33]

None of the Plaintiffs had ever agreed to purchase logs from Telaga Mas, and there is neither an allegation nor any evidence that they did. Plaintiffs were to be engaged in direct production operations conducted by a joint venture in which they had a controlling interest.[34] The Plaintiffs had made preparations to market the production from this operation and had specifically designated the United States as their main market.[35]

After elimination of Plaintiffs, Defendants structured their own operation as a purchase and sales contract between Telaga

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[31] Complaint, ¶¶ 27, 28; Rec. pp. 393, 394.

[32] Deposition of Earl Cone, p. 296. *See, e.g.* Memo from Jakarta to Tokyo dated Feb. 25, 1972, J-1830-33, Pl. Trial App. 059-62 (Rec. No. 75); Telex from Jakarta to Tokyo dated March 30, 1972, J-1584, Pl. Trial App. 043-44 (Rec. No. 75).

[33] Joint Venture Agreement of Dec. 24, 1970, Art. III, ¶¶ (7), (8), Pl. Trial App. 201 (Rec. No. 75); Complaint ¶ 28, Rec. p. 393; Pl. Trial App. 113-14 (Rec. No. 75).

[34] Complaint, ¶¶ 28, 33, Rec. pp. 389, 395-96, 402; Agreement of July 14, 1971, ¶ 4, Pl. Trial App. p. 291 (Rec. No. 75); Final Agreement of July 1, 1971, Pl. Trial App. 212-225 (Rec. No. 75); affidavit of Gautama, ¶ 5, Pl. Trial App. 160 (Rec. No. 75).

[35] Complaint, ¶ 57; Rec. p. 405; *see, e.g.* Deposition of E. V. Pedersen, Vol. II, pp. 99-100; Vol. V, pp. 601-07; Vol. VI, pp. 681-83, 770-75; Vol. VII, pp. 877-88 (Rec. No. 73). Marketing plans submitted to the Foreign Investment Board in 1972 represented that "[t]he primary market for plywood will be United States of America and Europe." It was further stated that "[t]he main market is the United States of America with estimated sales as follows. . . ." Foreign Investment Application, Form B, Pl. Trial App. p. 234 (Rec. No. 75); *see also* Affidavit of E. V. Pedersen, ¶ 5, Rec. p. 553.

Mas and Mitsui-USA.[36] This arrangement actually disguised an illegal joint venture which Defendants supervised and controlled so that "it should take on a form [on the surface] in which [Telaga Mas] operates by itself."[37] Although this unique concession area was Plaintiff's sole source of production and was vital to its operations, Defendants have numerous production operations in Indonesia and elsewhere.[38] Both Defendants also market substantial quantities of logs and lumber products and import substantial quantities of lumber products into the United States.[39]

The proposed operation by the joint venture between Plaintiffs and Telega Mas was subject to the approval of the Indonesian government.[40] This approval was obtained on July 1, 1971, when the newly-formed joint venture between Plaintiffs and Telaga Mas entered into a contract with the government setting forth the technical, capital, and organizational requirements of the operation.[41] The contracting parties to this agreement were the

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[36] Loan Agreement dated July 28, 1972, between Mitsui & Co. (USA), Inc. and Telaga Mas, U-1874-77, Pl. Trial App. pp. 355-58 (Rec. No. 75); Purchase and Sales Contract of Logs dated July 28, 1972, Art. 9, U-1878, Pl. Trial App. pp. 359-63 (Rec. No. 75).

[37] Complaint, ¶ 46. "Since it may cause a big problem if we bring out new joint enterprise scheme, it should take on a form surfacely in which TM Company operates by itself." Telex from Jakarta to Tokyo, September 20, 1971, J-1896-1900, Pl. Trial App. pp. 071-77 (Rec. No. 75). "Our company should not act surfacely." Telex from Jakarta to Tokyo dated December 13, 1971, J-1944-43, Pl. Trial App. pp. 087-88 (Rec. No. 75). Complaint, ¶ 52.

[38] *See, e.g.*, Answers of Defendant Mitsui & Co., Ltd., to Plaintiffs' First Set of Interrogatories, Nos. 3, 4, 9, 34, 35. For detailed references to the evidence, *see* Appellants' Reply Brief, pp. 11-12, No. 81-2175.

[39] *Id.* Answers Nos. 14, 29, 31, 32. As of 1980, Mitsui-USA imported approximately $70,000,000 worth of lumber products into the United States per year. Deposition of Jun Sasaki, Vol. I, p. 57 (Rec. No. 122).

[40] *See* 594 F.2d at 49.

[41] Complaint, ¶ 33, Rec. pp. 395-96, Pl. Trial App. 115, 116 (Rec. No.

joint venture between Plaintiffs and Telaga Mas on the one hand and the Indonesian government on the other.[42] By its very nature, the agreement required the continued existence of the joint venture entity. If the parties could not cooperate, or the joint venture were destroyed, the contract could not be performed.[43]

Mitsui-USA first alerted Mitsui-Japan to the Plaintiffs' proposed operation in February of 1971.[44] Although Mitsui-Japan initially had no objection to the operation, it was subsequently decided that it must be stopped.[45] Defendants' actions were specifically directed at preventing these Plaintiffs from entering competition, but there is evidence that these actions were part of a larger scheme which was directed against other companies as well. Defendants' records expressly state their intention to establish a monopoly on production from the area and reveal their desire to exclude Korean and Taiwanese companies as well as

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75); Final Agreement of July 1, 1971, Pl. Trial App. 212-225 (Rec. No. 75); Affidavit of Gautama, ¶ 5, Pl. Trial App. 160, 161 (Rec. No. 75).

[42] Final agreement of July 1, 1971, Pl. Trial App. (Rec. No. 75), p. 212; Affidavit of Gautama, ¶ 5, Pl. Trial App., pp. 160, 161 (Rec. No. 75).

[43] Affidavit of Gautama, ¶ 5, Pl. Trial App., pp. 160, 161 (Rec. No. 75).

[44] *See* Telex from Jakarta to Tokyo dated Nov. 5, 1971, J-1973-76, Pl. Trial App. 91 (Rec. No. 75); Deposition of Eiji Yashiro, Vol. II, pp. 383-84.

[45] Complaint, ¶¶ 43-46, Rec. pp. 399-401. "Since this forest area is very valuable as a source for the good quality Agathis lumber, we are of the same opinion with you that it must be secured by overcoming all the difficulties. Therefore, we expect that you will take necessary measures so that Min Tjae and Tek Long will cancel the corporation problem with Forest Products in the earliest time, and they will cooperate with our company in the future in the direction to reconstruct the company." (Telex dated March 30, 1972 from the Tokyo office of Mitsui & Co., Ltd. to its Jakarta office, J-1584, Pl. Trial App. 043-44). *See* Memo from Jakarta to Tokyo dated Aug. 4, 1971, J-1988-89, Pl. Trial App. 096-98 (Rec. No. 75).

Plaintiffs.[46] And, although Defendants' specific attack was directed at Plaintiffs' production capability, Defendants knew that Plaintiffs constituted an American effort to enter the logging and lumber products industry, and it was for this reason Defendants decided that the joint venture must be stopped.[47]

Defendants did not prevent Plaintiffs from entering into the business of producing and marketing logs and lumber products by petitioning the government of Indonesia or instigating some government action. Defendants' employees have recently testified that they never even discussed the matter with any official of the Indonesian government.[48] Instead, Defendants arranged a takeover of Plaintiffs' joint venture partner and caused that partner to withdraw from the joint venture with Plaintiffs in violation of its contractual duties.[49] Defendants recognized from the outset that if the joint venture were destroyed, the agreement with the government would be cancelled by operation of law.[50] In

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[46] To prevent the threatened intrusions of Korean and Taiwanese competitors, Defendants decided "it will be necessary to monopolize [the forest area] for our company as soon as possible." Memo from Jakarta to Tokyo dated Feb. 25, 1972, J-1830-33, Pl. Trial App. 059, 60 (Rec. No. 75).

[47] *See, e.g.*, Telex from Jakarta to Tokyo dated March 28, 1972, J-1597-98, Pl. Trial App. pp. 049-50 (Rec. No. 75). Mitsui-Japan was fearful that Plaintiffs would accept the offer of the "pro-Mitsui" officer to have Telaga Mas perform its agreement for an additional payment of $3,500,000. *Id.* "Since the capital of FP is only US$500,000, it seems that it cannot accept this. However, there is a support from USA, and the Agathis Woods in the TM forest area have been attracting the attention of every company, we cannot exclude a possibility of support from any source." Telex from Jakarta to Tokyo dated March 28, 1972, J-1594-96, Pl. Trial App. pp. 046-48 (Rec. No. 75).

[48] *See* Deposition of Eiji Yashiro, Vol. II, pp. 531-33, Deposition of Masashi Yamada, Vol. IV, pp. 462-63.

[49] The summary judgment evidence of Defendants' destruction of the joint venture is summarized in the first opinion of the court of appeals, 594 F.2d at 50. Mitsui's actions are established by their own records.

[50] Although they were confused as to time requirements, the Mitsui

fact, Defendants' records reflect that their involvement was kept a deliberate secret from that government.[51] There is also no evidence that the government disapproved of Plaintiffs or their participation in the timber industry. On the contrary, the government attempted to mediate the dispute instigated by Defendants and confirmed that the operation would be permitted if the joint venture partners could cooperate.[52]

As Defendants had planned, the destruction of the joint venture resulted in the automatic cancellation of the joint venture's agreement with the government.[53] But Defendants conceded below that Plaintiffs had already been put out of business nearly a year before the inevitable cancellation of the joint venture's contract occurred.[54] Furthermore, there is evidence that Defendants planned to thwart Plaintiffs' operation by other

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Defendants recognized that the joint venture agreement would lapse if Telaga Mas refused to perform. *See, e.g.*, Memo from Tokyo to Jakarta dated Oct. 1, 1971, J-1882-85, Pl. Trial App. 065-66 (Rec. No. 75). "Following the suggestion of the legal department, Telaga Mas will not respond to any discussion with Forest Products until December 18 and will not sign any document. . . ." Telex from Jakarta to Tokyo dated Nov. 13, 1971, J-1941-43, Pl. Trial App. 055-57 (Rec. No. 75). When the Director General encouraged settlement negotiations, Jakarta reported that "We have persuaded him [the Telaga Mas officer aiding Mitsui] to botch the whole talk by asking unreasonable demands. . . ." Memo from Jakarta to Tokyo, March 28, 1972, J-1594, 96, Pl. Trial App. 046-48 (Rec. No. 75).

[51] *See* footnote 37, *supra*.

[52] Letter dated February 18, 1973, Pl. Trial App. 352 (Rec. No. 75). Telegram from American Embassy dated March 26, 1973, Pl. Trial App. 177078 (Rec. No. 75). Letter dated April 19 from Soedjarwo, Director General of Forestry, to Mr. Soelistio, attorney for Forest Products, Pl. Trial App. 350 (Rec. No. 75). State Department Memorandum dated Nov. 20, 1975, Pl. Trial App. 179-80 (Rec. No. 75).

[53] Letter dated February 19, 1973; Pl. Trial App. 352 (Rec. No. 75).

[54] Def. Trial Brief, p. 25, n. 73. Defendants conceded that the takeover by the corporation Telaga Mas by the pro-Mitsui faction in 1972 is "what really killed the deal."

means, including preventing Plaintiffs from obtaining financing from the United States Export-Import Bank.[55]

After the demise of the joint venture, Mitsui-USA entered into a contract with Telaga Mas which required Plaintiffs' former joint venture partner to sell all production to Mitsui-USA and put the "Telaga Mas" operation under Defendants' direct supervision and control.[56] All production from the concession was purchased by the Houston office of Mitsui-USA and then resold to Mitsui-Japan at a substantial profit.[57] Deprived of their source of production, Plaintiffs were prevented from entering into competition in the production and marketing of Indonesian logs and lumber products and the importation of such products into the United States.[58] Defendants' actions have resulted in a substantial reduction in competition in these activities and an increase in the price of such goods imported into the country.[59]

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[55] At about the same time that Mitsui-Japan was terminating Plaintiffs' joint venture, Mitsui-USA made what amounted to a gift to Henry Kearns (then President of the Export-Import Bank) by buying worthless stock for approximately $400,000. *See* Yokoya deposition, Vol. II, pp. 120-22, 137, 149-50, 151-60 (Rec. No. 120). *See United States* v. *Kearns*, 595 F.2d 729 (D.C. Cir. 1978). It is apparently Defendants' position that they desired Mr. Kearns' cooperation for some other reason. *See* deposition of Takeuchi.

[56] Loan Agreement dated July 28, 1972, U-1874-77 between Mitsui & Co. (USA), Inc. and Telaga Mas, Pl. Trial App. pp. 355-58 (Rec. No. 75); Purchase and Sales Contract of Logs dated July 28, 1972, Art. 9 U-1878-82, Pl. Trial App. pp. 359-63 (Rec. No. 75). Telex from Tokyo to Jakarta dated May 10, 1972, J-1544-47, Pl. Trial App. pp. 037-38; Complaint § 52, Pl. Trial App. 123; Telex from Jakarta to Tokyo dated December 13, 1971, J-1944-45, Pl. Trial App. pp. 087-88. Memo dated September 20, 1971 from Jakarta to Tokyo, J-1896-1900, Pl. Trial App. pp. 071-77. Telex from Tokyo to Jakarta dated May 10, 1972, J-1544-47, Pl. Trial App. pp. 037-38. *See also* discussion pp. 19, 20, Plaintiffs' Reply to Motion to Dismiss (Rec. No. 75).

[57] *See* 671 F.2d at 883.

[58] Complaint, ¶¶ 50, 52.

[59] Complaint, ¶¶ 56-58.

## REASONS THE WRIT SHOULD BE DENIED

### (i) This interlocutory appeal presents only procedural and evidentiary questions, does not involve principles of general application, and review by this Court would further delay a trial of this case without disposing of the litigation.

The first and foremost reason that Defendants' petition for writ of certiorari should be denied is that this case does not present for review the issues which Defendants describe. The only legal issues which this case presents are purely procedural: whether summary motions are to be based on the pleadings and on undisputed evidence in the record, and whether Plaintiffs are to be permitted to complete discovery before they are required to adduce complex evidence of intent and market effect. The court of appeals has three times held that Defendants' legal theories are not supported by the pleadings or evidence in this case and has twice noted that Plaintiffs have been denied essential discovery.[60] That this is the primary basis of the court's holding was expressly reiterated in its recent *per curiam* opinion on remand from this Court.[61]

In the petition before this Court, Defendants' legal theories are based on what they describe as "the gravamen" of the allegations;[62] those allegations which do not accord with their theories are simply dismissed as not "plausible."[63] Both here and below, Defendants' arguments are premised on factual statements which are flatly contradicted by the record.[64] The court of appeals has described Defendants' arguments as "a series of mere assertions, unsupported by the pleadings or by summary

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[60] 594 F.2d at 54, 671 F.2d at 883-84, 704 F.2d at 786.

[61] 704 F.2d at 786.

[62] *See, e.g.*, Petition, pp. 8, 10 ("gravamen"); 9 ("gist").

[63] *See* Petition, p. 13.

[64] *See* notes 29-59, *supra*, and accompanying text.

judgment evidence."[65] If Defendants' petition were granted, this Court would not be presented with legal questions of general application to other cases. The Supreme Court would instead be required to examine a voluminous record to determine if the court of appeals was correct in rejecting Defendants' interpretations of the pleadings and evidence.

The sole purpose of this time-consuming effort would be to postpone the trial on the merits which will occur as soon as this appeal has been concluded. Decision of the issue presented by this appeal would not be dispositive of this litigation. Plaintiffs have valid common law claims which are supported by both diversity and pendent jurisdiction.[66] In addition, Plaintiffs have alleged claims under both Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 73 of the Wilson Tariff Act, 15 U.S.C. § 8, which are not here presented.[67] Because all these claims arise out of the same events, an advance ruling on the Section 1 claims would not even appreciably shorten the trial.

(ii) **The court of appeals was correct in rejecting Defendants' evidentiary arguments and holding that Plaintiffs have standing under Associated General Contractors.**

The only issue which is presented by this appeal is whether Plaintiffs' allegations give them standing to recover for injuries sustained by reason of a violation of Section 1 of the Sherman Act. This Court should deny the petition and should not review the decision of the court below as to that issue for several reasons.

First, the question which is posed by Defendants' petition is neither raised nor even suggested by the actual facts of this case. As discussed above, this litigation does not involve competition

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[65] 671 F.2d at 885.

[66] Complaint, ¶¶ 14, 62.

[67] Complaint, ¶¶ 12, 55.

between two companies to purchase logs from an Indonesian seller.[68] The complaint alleges:

> Plaintiffs would show that their proposed operation consisted of harvesting and exporting logs and lumber products from Indonesia, and importing such materials into several markets, but that their chief market was the United States. Until prevented by the conspiracy herein alleged, [Plaintiffs] attempted to enter into competition with [Defendants] in the exporting and sale of logs, lumber and wood products from Indonesia to the United States; and in the importing and sale of processed goods and machinery from the United States into Indonesia.

All of Defendants' lengthy standing analysis has been based on an attempted transmutation of the elemental facts of this case.[69] Whether a plaintiff injured by increased competition can recover under the antitrust laws is a question which will have to be decided in some other case,[70] because it is not presented in the case at bar. The record in this case is devoid of any allegation or evidence which would support the petition's claims that Defendants' activities have increased competition in *any* area of economic activity. It is inconceivable that the elimination of a new entrant by established multinationals somehow increased competition in the production and marketing of logs and lumber products. The complaint specifically alleges harm to competition in these activities and a reduction in competition in the importation of logs and lumber products into the United States.[71]

Defendants' claim that this case involves the substitution of one competitor for another is merely a variation on the same theme.[72] In fact, this would not be a substitution case even if the

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[68] *See* footnotes 29-49, *supra*, and accompanying text.

[69] *See* Petition, pp. 2, 8, 10-11.

[70] If it has not already been decided in *Brunswick Corp.* v. *Pueblo Bowl-a-Mat*, 429 U.S. 477 (1977).

[71] Complaint, ¶¶ 56, 57.

[72] Petition, p. 11.

area of competition were artificially limited to the purchase of logs from one concession.[73] But that is not the area of competition involved in this litigation.[74] Summary motions must be decided on the allegations which the complaint actually contains unless there is some reason to disregard them. Here the theory that competition was unaffected by Defendants' conduct is based entirely on Defendants' proposed definition of the area of competition. That definition conflicts with express allegations in the complaint, and is contrary to the weight of the evidence thus far adduced.

These Plaintiffs sought to produce and market logs and lumber products and import them into the United States.[75] They had made extensive preparations to engage in both production and marketing.[76] They had never agreed to be purchasers of logs from Telega Mas or anyone else.[77] Defendants were and are powerful forces in the production, marketing, and importation of

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[73] Plaintiffs' agreement with Telaga Mas related to the development of the northern section which was not being utilized. Defendants decided to take over the entire area and market it only to their own customers. *See, e.g.*, Memo from Jakarta to Tokyo dated February 25, 1972, J-1830-33, Pl. Trial App. pp. 59-62 (Rec. No. 75). The subsequent purchase contract contains an exclusive-dealing provision and refers to the entire 160,000 hectares. Purchase and Sales Contract of Logs dated July 28, 1972, U-1878-82, Pl. Trial App. pp. 359-63 (Rec. No. 75). Plaintiff, on the other hand, had even offered to sell to Mitsui. Complaint, ¶ 35, Rec. p. 396.

[74] *See* footnotes 29-49, *supra*, and accompanying text.

[75] Complaint, ¶ 50.

[76] Complaint, ¶¶ 15, 27, 28, 35, 50 (obtaining production source); Deposition of Herbert Ziegler, pp. 5-12 (Rec. No. 98); Deposition of Theo N. Law, pp. 18-19 (Rec. No. 103); Deposition of Charles Houston, p. 12 (Rec. No. 56). For a discussion of these preparations see Brief of Appellants, pp. 7-8; Appellants' Reply Brief, pp. 7-9. Among other things, the evidence flatly contradicts Defendants' irrelevant assertions that Plaintiffs lacked the requisite financial resources. *See* Petition, p. 17, n. 15.

[77] *See* footnotes 30-35, *supra*.

such products.[70] They sought to and did prevent Plaintiffs and others from competing with them in these activities by controlling the available source of production.[71] Plaintiffs seek by this suit to recover the profits they would have made had they been permitted to enter direct competition with these Defendants.[72] What the record in this case actually reveals — as opposed to Defendants' description of the "gravamen" of the litigation — is merely traditional antitrust plaintiffs seeking traditional antitrust damages.

In *Associated General Contractors*, this Court listed five factors which were to be taken into consideration in determining whether a particular plaintiff could assert a claim for injuries sustained by reason of anything forbidden by the antitrust laws.[73] In the case at bar, all five of these factors compel recognition of Plaintiffs' standing. Plaintiffs were direct competitors with Defendants in the production and marketing of logs and lumber products.[74] Defendants intended their activities to injure these particular Plaintiffs — whom their records mention by name.[75] The injury to Plaintiffs was the direct and intended result of Defendants' efforts to establish a monopoly and to

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[70] *See* footnotes 38, 39, *supra*. *See also* Appellants' Reply Brief, No. 81-2175, pp. 11-12.

[71] Complaint, ¶ 52. *See* 671 F.2d at 886; 704 F.2d at 786.

[72] Complaint, ¶ 59. "The wrongful acts of Defendants and their co-conspirators have deprived [Plaintiffs] of [their] contract and concession rights, of [their] ability to enter and compete in the market, and of the profits [they] would have derived from such operations."

[73] *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 75 L.Ed.2d 723, 737-43 (1983).

[74] *See* footnotes 29-49, *supra*.

[75] *See e.g.*, Telex dated March 30, 1972, from Jakarta to Tokyo, Pl. Trial App. pp. 043-44; Telex from Jakarta to Tokyo dated August 9, 1971, Pl. Trial App. pp. 009-010; Telex from Jakarta to Tokyo dated August 20, 1971 (Rec. No. 75). The American Plaintiff is referred to as "Ziegler", from its description in the December 24, 1970, agreement as "Ziegler-Forest." Ziegler Steel Service Company, which had guaranteed the performance of Forest Products,

deprive these Plaintiffs of their production capability.[84] Defendants concede that this case does not involve complex problems of proof relating to the apportionment of damages.[85] And the damages Plaintiffs seek are not only "related" to the anticompetitive nature of Defendants' misconduct, but are the very profits Plaintiffs would have earned had competition not been injured.[86] Plaintiffs clearly have standing to bring this suit.

(iii) **Defendants' jurisdictional argument has not been preserved for review; furthermore, the facts disclosed by the record fully support the court of appeals' finding of jurisdiction.**

As noted, Defendants included the question of federal jurisdiction as one of two points on which they asked this Court to grant *certiorari* in their second petition.[87] As an alternative ground of relief, they asked for remand of the standing issue to the court of appeals.[88] This Court's order[89] remanded to the court below for reconsideration in light of *Associated General Contractors*, a case which involved only standing and did not involve "extraterritorial" jurisdiction.[90] Plaintiffs believe that this Court's order implicitly denied the Petitioners' request for a review of their jurisdictional arguments. In any event, interlocutory certiorari petitions should be limited to the issues addressed by the last opinion of the court below. The alternative,

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was described as an affiliated company. *See* Ziegler deposition, pp. 5-12 (Rec. No. 98).

[84] Complaint, ¶ 5d.

[85] Petition, p.11.

[86] Complaint, ¶¶ 59, 60.

[87] 1982 Petition, pp. 4, 5.

[88] 1982 Petition, p. 12, n. 8.

[89] *Mitsui & Co., Ltd.* v. *Industrial Investment Development Corp.*, .... U.S. ...., 103 S.Ct. 1244 (1983).

[90] 74 L.Ed.2d 723, 103 S.Ct. 897.

as this case demonstrates, is delay while issues are relitigated at the whim of the litigants.

The jurisdictional argument in the current petition is the same as that advanced in the 1982 petition. The court of appeals found jurisdiction over restraints which directly or substantially affected the flow of commerce into or out of the United States. The actual facts of this case not only satisfy that test, but also satisfy the test employed in *National Bank of Canada* v. *Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981), which Defendants cite in an attempt to establish a conflict between the circuits. No such conflict exists because the case before this Court differs from *National Bank of Canada* in several important respects. In the instant case, there has been no trial on the merits, many of Defendant's wrongful acts occurred within the United States, and there was an anticompetitive effect on commerce.

This case involves the efforts of an American importer and its Japanese parent to restrict competition in the importing of logs and lumber products into the United States.[91] The Plaintiffs are an American corporation and two foreign subsidiaries. The restraint was accomplished by depriving Plaintiffs of a source of production on foreign soil. The contract by which Defendants accomplished their aims was with the American Defendant, which actually purchased all production and then resold it to its Japanese parent.[92] Not only was the restraint accomplished by a transaction within the actual course of United States commerce, but there is evidence of other acts in furtherance of the conspiracy which occurred on American soil. There are express allegations that Defendants intended to affect United States commerce and that their conduct has substantially reduced competition in the importation of logs and lumber products into

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[91] *See* footnotes 29-49, *supra*, and accompanying text; 671 F.2d at 883; 704 F.2d at 786.

[92] *See* 671 F.2d at 883.

this country.[93] These facts establish jurisdiction. *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927).

Defendants' jurisdictional argument is based entirely on the same factual misstatements which they advance in connection with standing. They deny an "anticompetitive effect" on United States commerce on the theory that competition between Plaintiffs and Defendants was limited to the purchase of logs from an Indonesian logger.[94] That assertion is contradicted both by the pleadings and by evidence that the court below has described as "ample."[95]

There is obviously no conflict between the court of appeals' decision in this case and the decision of the Seventh Circuit in *Bunker Ramo* v. *United Business Forms*, 1983-2 Trade Cas. (CCH) ¶65,515 (7th Cir. July 26, 1983). The jurisdictional question presented by *Bunker Ramo* was whether the plaintiffs' cause of action had a sufficient nexus with interstate commerce and was not whether the Sherman Act should be applied extraterritorially. In finding jurisdiction, the court warned against dismissing antitrust cases on the pleadings: "The impact the defendants' activities may have upon interstate commerce is a question of fact not normally susceptible of determination without scrutiny of the proof that may be offered." 1983 — 2 Trade Cases at p. 68526. The court dismissed the plaintiffs' case (with leave to replead) because "plaintiff has not alleged any anticompetitive effect arising from Defendants' conduct." Id. at 68,528. Here, the court below required and found sufficient summary judgment evidence of anticompetitive effect.[96]

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[93] Complaint, ¶¶ 52, 56-58.

[94] Petition, pp. 12, 15.

[95] 671 F.2d at 883.

[96] *See* 671 F.2d at 889, n. 16.

(iv) **The act of state issue was ruled upon in 1979 and is not before this Court.**

In 1979, the court of appeals reviewed the undisputed facts relevant to the act of state defense and concluded — not just that Defendants were not entitled to a summary judgment — but that the act of state doctrine does not apply in this case. 594 F.2d at 55-56. After requesting and reviewing an *amicus curiae* brief by the Solicitor General, this Court denied certiorari. 445 U.S. 903. If Defendants are permitted to reassert their act of state defense at any convenient juncture, then the efforts of the courts, the parties, and the Solicitor General have accomplished nothing. The act of state issue was not relitigated to the trial court in connection with the second summary judgment and was not raised on the second interlocutory appeal to the court below or in the second interlocutory petition for writ of certiorari. Plaintiffs submit that this Court, as a matter of judicial economy or as a matter of jurisdiction, should not grant a petition for certiorari filed four years after the decision which is attacked. *See Pearce* v. *Germania Insurance Co.*, 96 U.S. 461 (1978); *Magwire* v. *Tyler*, 84 U.S. (17 Wall.) 253 (1873); *Washington Bridge Co.* v. *Stewart*, 44 U.S. (3 How.) 13 (1845). The cases cited by Defendants in support of their request to reopen the court of appeals' 1979 decision are not pertinent here. Both cases involved denial of certiorari on an interlocutory appeal followed by grant of certiorari after trial on the merits.[27]

Defendants claim no new evidence bearing on the act of state defense, although there has, in fact, been new evidence: Defendants' employees admit that they never even discussed this matter with any official of the Indonesian government and do not know of anyone else who did.[28] Defendants' anticompetitive

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[27] *Mercer* v. *Theriot*, 377 U.S. 152 (1964); *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363 (1972).

[28] Deposition of Eiji Yashiro, Vol. II, pp. 531-33, 561-62; Deposition of Masashi Yamada, Vol. IV, pp. 462-63.

scheme was effected in this case entirely by the disruption of contractual relations between private parties.[99] The Indonesian government was simply not involved in this matter, and the act of state doctrine clearly does not apply.

The distinction between this case and the Second Circuit's decision in *Hunt* v. *Mobil Oil Co.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) was discussed in reply to Defendants' 1979 petition.[100] The current petition attempts to establish a conflict with the Ninth Circuit, but the supposedly conflicting decision actually cites the instant case with approval.[101] *See Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,523 (9th Cir. Aug. 2, 1983). That case involved a concession allegedly obtained by bribery.

(v) **The court of appeals was clearly correct in holding that this case cannot be dismissed under the forum non conveniens doctrine, and that issue has not been preserved for this Court's review.**

In the two *National City Lines* cases[102] this Court clearly held that the common law doctrine of *forum non conveniens* has been overridden by statute in antitrust cases. The statutes permit transfer of an antitrust case to another United States district court, but not dismissal.[103] The court below correctly followed

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[99] *See* footnotes 48-54, *supra*, and accompanying text; 594 F.2d at 54.

[100] Brief in Opposition to Petition for Writ of Certiorari, pp. 13-15, 79-552.

[101] In fact, at least one other Ninth Circuit decision has also cited the instant case with approval. *See Northrup Corp.* v. *McDonald Douglas Corp.*, 705 F.2d at 1030, 1048 (9th Cir. 1983). If there is a conflict with the Fifth Circuit, the Ninth Circuit seems unaware of it.

[102] *United States* v. *National City Lines, Inc.*, 334 U.S. 573 (1948); *United States* v. *National City Lines, Inc.*, 337 U.S. 78 (1949).

[103] Clayton Act, ¶ 4, 15 U.S.C. ¶ 15, 22; 28 U.S.C. ¶ 1404 (a).

that rule.[104] In the case at bar, dismissal would do especial violence to the statutory policy discussed in the *National City Lines* decisions. The court of appeals has concluded,[105] and Defendants have conceded,[106] that Plaintiffs' antitrust claims could not be asserted in a foreign tribunal. Thus the district court would have assumed the power, for reasons of convenience, to abolish rights granted to Plaintiffs by Congress. It is significant that Defendants have found not a single decision reaching this impossible result.

Whether common law *forum non conveniens* could apply in this case is a moot point. Although the district judge did not discuss the issue, dismissal of this case under that doctrine would be an abuse of discretion. It was the Houston office of Mitsui-USA which first advised its parent of Plaintiffs' proposed operations. It was also the Houston office of Mitsui-USA which entered and performed the contract which eliminated Plaintiffs from competition.[107] And, for a variety of reasons, there is no other forum in which these Plaintiffs could obtain meaningful relief.[108]

Defendants did not raise the issue of *forum non conveniens* in their second petition for writ of certiorari. That ommission was a waiver of the issue on this third petition. In *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1 (1961), this Court held that a claim which could have been, but was not, raised in a prior petition for writ of certiorari had been

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[104] 671 F.2d at 890.

[105] *Id.*

[106] Petition, p. 22.

[107] *See* footnotes 44, 56, 57, *supra*, and accompanying text.

[108] Defendants conceded below that Mitsui-USA could not be sued in Indonesia. Brief of Appellees, p. 29, No. 81-2175, United States Court of Appeals for the Fifth Circuit. There is no evidence that Mitsui-Japan has assets in Indonesia from which a judgment could be collected.

abandoned. This Court has also refused to consider matters which were ruled on by courts of appeal but not raised in petitions for writ of certiorari. *Prudence Co.* v. *Fidelity & Deposit Co.*, 297 U.S. 198 (1936); *Erie Railroad Co.* v. *Collins*, 253 U.S. 77 (1920).

## CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari have been delivered to the attorneys for Petitioner, Mr. Thomas R. McDade, Fulbright & Jaworski, 800 Bank of the Southwest Building, Houston, Texas 77002, on October 17, 1983.

LOUIS PAINE

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No. 83-398

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

MITSUI & CO., LTD., AND
MITSUI & CO. (U.S.A.), INC.,

*Petitioners,*

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION,
INDONESIA INDUSTRIAL INVESTMENT CORPORATION, LTD.,
AND FOREST PRODUCTS CORPORATION, LTD.,

*Respondents.*

## REPLY MEMORANDUM FOR PETITIONERS

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## REPLY MEMORANDUM FOR PETITIONERS

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The Petition for a Writ of Certiorari requests the Court to settle discrete, unresolved questions of law regarding primarily whether the antitrust statutes are designed to proscribe only *anticompetitive* acts and whether American courts should infringe upon foreign sovereignty by evaluating the acts of foreign government officials. As to each issue, the petition points out direct and irrevocable conflicts between circuits that need to be, and can be, resolved by a decision in this case.

Respondents apparently do not recognize that such is the very purpose of this Court's discretionary power of review by writ of certiorari. Respondents seek to obscure the presentment of these clean and simple but important issues by arguing the merits of their case with 108 mostly factual footnotes and 11 pages of respondents' view of the facts, with references to the appellate record that is not even before this Court. Respondents' argument on the merits should await the issuance of a writ of certiorari.

## REASONS FOR ALLOWING THE WRIT

1. *Standing.*

In attempting to oppose certiorari by arguing the factual merits of their case, respondents have not grappled with the fact that the Fifth Circuit, on remand, failed to follow this Court's mandate that it reconsider the standing issue in light of *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 103 S. Ct. 897 (1983). The court of appeals, for example, still refuses to address or decide the question of whether a competitor, allegedly "injured" because he is substituted for as a purchaser, has suffered "antitrust injury." That is a question of broad applicability that is ripe for decision by this Court and at least justifies a remand with specific instructions that it be addressed. It is a question that needs to be answered, to determine whether the *antitrust* laws should redress every alleged business wrong or only those that are *anticompetitive*. An answer to this question will define the very essence of antitrust standing.

Subsequent to the filing of the petition herein, a court of appeals decision has been rendered that is in conflict with the decision below on another aspect of the standing issue, thus creating further reason for this Court to review the antitrust standing question. In *Meyer Goldberg, Inc.* v. *Fisher Foods, Inc.*, No. 82-3063 (6th Cir. Sept. 14, 1983), the court held that, in light of *Associated General Contractors* and of *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982), a stockholder has no antitrust standing under section 4 of the Clayton Act to assert antitrust claims on behalf of a corporation.[1]

The court of appeals below held otherwise, rejecting petitioners' assertion that the instant respondents have no standing

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[1] The court stated that contrary language in *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981), had been overruled by *Associated General Contractors*.

because they are merely shareholders in the corporation whose business allegedly was injured by petitioners. *See* Petition, App. E, at 43a-47a. On remand, petitioners suggested to the Fifth Circuit panel that under *Associated General Contractors*, 103 S. Ct. at 910 n. 46, respondents have no standing as stockholders. In its cursory, two-page opinion (Petition, App. I), the panel treated this standing issue as it did all the other issues which petitioners asked it to review in light of this Court's instructions: It failed to address them in any respect.

The question of whether stockholders have antitrust standing is ripe for review. In addition to the holding of *Associated General Contractors*, there is now an irreconcilable conflict between circuits. The Court should grant review or, as a less desirable alternative, should remand with instructions that the appeals panel evaluate the stockholder issue in light of the factors enunciated in *Associated General Contractors* and *Blue Shield*.

2. *Extraterritorial Jurisdiction.*

On the extraterritorial jurisdiction issue,[2] respondents again try to argue their factual case before this Court but do not face the stark conflict between at least three courts of appeals[3] on this

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[2] Respondents' suggestion that "certiorari petitions should be limited to the issues addressed by the last opinion of the court below" (Br. in Opposition at 18) is clearly wrong. See *infra* note 4. Moreover, on remand petitioners requested the opportunity to brief the extraterritorial jurisdiction issue and intervening decisions concerning the other issues. That request was denied by the panel.

[3] The opinion in *National Bank of Canada* v. *Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981), openly differs with that of *Timberlane Lumber Co.* v. *Bank of America*, N.T. & S.A., 549 F.2d 597 (9th Cir. 1977), charging that the latter, which does not require an *anticompetitive* effect, "may lead unwarrantedly to an assertion of jurisdiction whenever the challenged conduct is shown to have some effect on American foreign commerce, even though the actionable aspect of the restraint, the anticompetitive effect, is felt only within the foreign market in which the injured plaintiff seeks to

issue. In *National Bank of Canada* v. *Interbank Card Association*, 666 F.2d 6, 8 (2d Cir. 1981), the Second Circuit held that there is no antitrust jurisdiction unless there is an *anticompetitive* effect upon American commerce. The Fifth Circuit, however, held below that antitrust jurisdiction exists if there is a *direct* or *substantial* effect upon American commerce.

The difference between these two decisions is striking. The Fifth Circuit "divorces antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so," *Brunswick* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486-87 (1977), by conferring jurisdiction where any party can show a mere effect upon commerce, while the Second Circuit's opinion recognizes "the pro-competition policy of the antitrust laws," *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982), by requiring an anticompetitive effect.

This issue needs to be resolved. In the instant litigation, it could end the case or give proper guidance to the trial court. More importantly, the issue could arise in virtually every antitrust case involving foreign commerce.

3. *Act of State Doctrine.*

Respondents' suggestion (Br. in Opposition at 21) that the Act of State question should not be reviewed four years later only underscores petitioners' assertion that the need is greater now than ever for the "motivation-validity" issue to be resolved.[4] Respondents do not deny the existence of an irresolvable conflict, nor do they question that the issue continues to be raised again

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compete." 666 F.2d at 8. The court below relied in part upon the analysis in *Timberlane*. *See* Petition, App. E, at 37a.

[4] The jurisdiction of this Court is undeniable. The Court "may consider questions raised on the first appeal, as well as those that were before the court of appeals upon the second appeal." *Mercer* v. *Theriot*, 377 U.S. 152, 153 (1972). The cases cited by respondents (Br. in Opposition at 21) do not apply because they were decided before review by certiorari was first created in 1914.

and again in this Court and in various circuits or that even the Fifth Circuit subsequently has disagreed with the split decision below. *See* Petition at 21. The issue, implicating a critical question of international relations, will not be resolved until this Court decides it.

Respondents' suggestion that the Act of State Doctrine does not apply to this case is lame. State Department documents subpoenaed in this case reveal that after this lawsuit was filed, respondents' counsel, in an attempt to avoid application of the Doctrine, wrote the State Department requesting a "Bernstein letter," or exception, to the Doctrine. *See Bernstein* v. *N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71 (2d Cir. 1949), *modified*, 210 F.2d 375 (2d Cir. 1954). The fact that the State Department, in the conduct of our foreign relations, refused to issue such a letter is an indication that the inquiry into the motivations of the Indonesian Government would be offensive and would hinder the conduct of American foreign policy. The district court below apparently agreed, as did a dissenting judge on the Fifth Circuit.

If the court of appeals is not reversed, the inquiry into Indonesian governmental motivation *will be made* as a part of petitioners' case. Accordingly, whether that inquiry is proscribed by the Act of State Doctrine is a matter ready for decision by this Court.

4. *Forum Non Conveniens.*

In still another effort to avoid the merits of an issue, respondents argue that petitioners have waived the *forum non conveniens* question. However, the only cited case carefully limits its holding to reviews of *administrative agency* action and does not apply here. *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1, 30-32 & n. 8(1961).

Respondents do not even mention this Court's most recent *forum non conveniens* opinion, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981). At a minimum, this cause should be remanded for further consideration of the *forum non conveniens* issue in light of factors enunciated in *Piper*, decided after oral argument herein.

The *forum non conveniens* issue bears upon respondents' non-federal claims, as well. In the exercise of discretion, the district court declined pendent jurisdiction over those claims. In light of *Duncan* v. *Cessna Aircraft Co.*, 26 Tex. Sup. Ct. J. 507, 510 (July 13, 1983), *see* Petition at 23 n. 24 (which case respondents completely ignore), at least a remand appears appropriate to re-evaluate the panel's views concerning the pendent claims. *See* Petition, App. E, at 32a n. 2.

For the reasons stated herein and in the petition, a writ of certiorari should issue, and all proceedings in the district court should be stayed.

Respectfully submitted,

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